

641

## SUMMARY OF DEBTS AND ASSETS.

[FROM THE STATEMENTS OF THE BANKRUPT IN SCHEDULES A AND B.]

Schedule A.	1 (1)	Taxes and debts due United States .....	
" "	1 (2)	Taxes due States, counties, districts and municipalities .....	
" "	1 (3)	Wages .....	
" "	1 (4)	Other debts preferred by law .....	
Schedule A.	2	Secured claims .....	\$2,414,537 83
Schedule A.	3	Unsecured claims .....	1,403,723 36
Schedule A.	4	*Notes and bills which ought to be paid by other parties thereto. Hence contingent liability .....	5,807,363 02
Schedule A.	5	Accommodation paper .....	
Schedule A, total .....			\$9,625,624 21

642

Schedule B.	1	Real estate .....	\$35,000 00
Schedule B.	2-a	Cash on hand .....	1,641 83
" "	2-b	Bills, promissory notes and securities .....	152,499 38
		*Notes and bills, etc., offsetting contingent liability shown by Schedule "A" 4. ....	5,807,363 02
" "	2-c	Stock in trade .....	
" "	2-d	Household goods, &c. ....	
" "	2-e	Books, prints and pictures .....	
" "	2-f	Horses, cows and other animals .....	
" "	2-g	Carriages and other vehicles .....	
" "	2-h	Farming stock and implements .....	
" "	2-i	Shipping and shares in vessels .....	
" "	2-k	Machinery, tools, &c. ....	413 70
" "	2-l	Patents, copyrights and trade-marks .....	
" "	2-m	Other personal property .....	71,005 25
Schedule B.	3-a	Debts due on open accounts .....	998,601 03
" "	3-b	Stocks, negotiable bonds, &c. ....	2,273,715 53
" "	3-c	Policies of insurance .....	
" "	3-d	Unliquidated claims .....	
" "	3-e	Deposits of money in banks and elsewhere .....	18,860 40
Schedule B.	4	Property in reversion, remainder, trust, &c. ....	
Schedule B.	5	Property claimed to be excepted .....	
Schedule B.	6	Books, deeds and papers .....	
Schedule B, total .....			\$9,359,100 14

\* In case these bills and notes, etc., are not paid by makers or acceptors, etc., at maturity a contingent asset and liability ensues for petitioner.

(Endorsed)—Schedules.—Filed Dec 26, 1907.

Letters giving particulars of securities held in 2644  
escrow by Messrs. Kessler & Co. of New York.

KESSLER & Co. Bankers,  
No. 54 Wall Street,  
New York  
June 30 1903.

Per S. S. "Oceanic."

MESSRS. KESSLER & Co. LIMITED,  
Manchester.

DEAR SIRS:—

In accordance with instructions from Mr. Alfred Kessler we have today placed in a separate package in our safe deposit vaults the following securities, 2645 package marked, "Escrow for account of Kessler & Co., Limited, Manchester:"

1484 shares Oklahoma Gas & Electric Co.	
at 25 .....	\$37,100.
2428 shares United Lighting & Heating Co., at 12 .....	29,136.
2352 shares Daimler Manufacturing Company, at 50 .....	117,600.
\$373,000. United Breweries Co. first 6s, at 65 .....	242,245.
	<hr/>
	\$406,081.

This escrow is intended as a protection against 2646  
our long drawings against your good selves.

Kindly confirm if in order, and oblige,

Yours very truly,

KESSLER & Co.

8th JULY 3.

MESSRS. KESSLER & Co.  
New York.

DEAR SIRS,

We are in receipt of your favor of 30th ultimo in which you advise us of the securities you have



2647 laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality.

We have also your letter of the same date advising two cheques for, respectively:

£415 : 9 : 2 and £403 : 0 : 11.

on account of interest due to the estate of Wm. Kessler. These we have handed to Mr. P. W. Kessler as Executor of the estate.

We are, dear Sirs,

Yours very truly,

P. W. KESSLER.

Private

23rd Dec.

3.

MESSRS. KESSLER & Co.,  
New York.

DEAR SIRs,

2649 For the purposes of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st December.

We do not think the matter will present any difficulty for you. Something in the form of the enclosed is what we require.

Thanking you in advance

We are, dear Sirs,

Yrs truly,

P. W. KESSLER.

We certify that we have specially set aside and hold for your acct on this the 31st day of December

/03 as security for the drawing credit which you 2650  
accord us, the following securities.

Name secs and market value

KESSLER & Co.

Bankers

54 WALL STREET,  
NEW YORK 1 JAN 1904.

MESSRS. KESSLER & Co. LIM

Manchester

DEAR SIRs,

We certify that we have specially set aside and  
hold for your account on this the 31st day of De- 2651  
cember 1903, as security for the drawing credit  
which you accord us, the following securities:

21/3/04

1484 shares Oklahoma Gas & Electric at	
25 .....	\$37,100.
2428 shares United Light & Heating at	
10 .....	24,280.
2352 shares Daimler Mfg Co. at 50.....	117,600.
\$36,000 United Brewery New 1st 6%	
bonds at 100 .....	36,000.
\$50,000 United Brewery New 1st 6%	
notes at 100 .....	50,000.
\$134,800 Certificate of payments to	
Trust Co. on a c 1st Mortgage	2652
bonds of Chicago & Gt. Western	
R.R. at 89 .....	119,972.
1348 Shares Com. Stock C. Gt. W. at 15	20,220.
	<hr/>
	\$405,172.

You hold in addition to this

1606 Shares United Lighting and Heat	
at 10 .....	16,060.

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\$421,232.

KESSLER & Co.

2653 Private

20 Jan'y 4.

MESSRS. KESSLER & Co.  
New York.

DEAR SIRs,

We are in receipt of your favor of 1st Jan'y, in which you give us particulars of the securities you hold in escrow for us against your drawing credit with us. The same are noted.

Should you, in the course of the year, through sale or otherwise, have occasion to vary that deposit, we should feel obliged by your advising us forthwith.

We are, dear Sirs,  
Yours very truly,  
P. W. KESSLER.

KESSLER & Co. Bankers,  
No. 54 Wall Street,  
New York Feb 12th 1904.

p. "New York"

DEAR KESSLER,

2655 Alfred left early yesterday morning for Washington to-day being Lincoln's Birthday; he won't be back before Monday. He told me to write to you, to say that he has set aside for you in the usual way the following securities

\$98,000 D and S. W. 5s at 36 .....	\$35,280.
(of which \$36,000—only are our own the rest being collaterals from others)	
Note of C. H. Devlin, endorsed by W. K. Gillett .....	25,000.
200 shares Alliance Realty Co. at 92....	18,400.
	<hr/> \$78,680.

Of the drafts of £20,000 drawn on you yesterday 2656  
 £5000 were on our regular account with you and  
 £15,000 on the emergency account. I am glad you  
 accepted our request for the additional accommo-  
 dation, and was glad to see that the cablegram  
 which Alfred gave me to send off to you on Tues-  
 day night (he ding out that evening) was clear to  
 you; Alfred did not want to make it so long, but  
 I felt you should have rather complete facts at  
 once. I saw him writing to you on Wed. so pre-  
 sume you've got all the facts.

We cabled M200,000.— to Bremen on Wed. and  
 M300,000.— yesterday, and have offered to pay the  
 balance of the drafts on Monday also at Bremen, 2657  
 unless the Deutsche Bank agree to intervene by ac-  
 ceptance of the drafts. We expect their answer as  
 to this to-morrow morning.

I am going to write a few lines to Alfred now.  
 All the morning I was busy with letters to the  
 Deutsche Bank and to the Dresdner Bank.

With kind regards

Sincerely yours  
 RUDOLPH E. F. FLINSCH.

Sat. Mrg.

Deutsche Bk say they would prefer cable remit-  
 tance, so we send them to-day by wire M500,000.—  
 more.

2658

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KESSLER & Co.

Bankers.

54 Wall Street,

New York 16 Feb. 1904.

MESSRS. KESSLER & Co. LIM.

Manchester.

DEAR SIRS,

In regard to our Mr. Flinsch's letter of 12 Feb.  
 to your Mr. P. W. Kessler wherein we named fur-

2659 ther securities placed in your escrow for a further drawing of

£15,000 90 d/s, we to-day have drawn

£10,000 60 d/s (could not sell 90's) and have added to your escrow as security for this drawing  
Balance of 12 Feb escrow more than

amount of draft ..... \$6,000.—

Den & S. W. Tax receipt, which is ahead  
of all bonds, floating debt and  
claims against Co. .... 25,073.81

\$16,850 Certificate of 10% payment on  
a/c 1st Mort Bonds Chicago & Gt.

W. at 89 ..... 14,996.50

£660 168-1/2 shares com. stock C. G. W. at 15.. 2,527.50

\$48,597.81

Yours truly,

KESSLER & Co.

*Private*

26 Feby. 4.

Messrs. KESSLER & Co.

New York.

DEAR SIRs,

2661 We note from your favor of 16 inst. and from Mr. Flinsch's letter to the writer of the 12th, the securities that you have set aside as escrow to protect the extra drawings that we have authorized you to make upon us, the amount to date being £25,000.

Yours truly,

KESSLER & Co., LIMITED.

P. W. KESSLER, Director.

KESSLER & Co.  
Bankers.

2662

54 Wall Street,  
New York, 8 March, 1904.

MESSRS. KESSLER & CO., LIM.  
Manchester.

In regard to escrow of 12 Feb., we have taken out  
20,000 D. & S. W. Bonds at .....36 7,200  
200 shares Alliance Realty ..... 18,400  

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\$25,600

and placed in same  
1000 shares (£5 paid) Underground Electric of 2663  
London, plus  
2000 do Beneficial Interest .. \$25,000  
Yours truly,

KESSLER & Co.

KESSLER & Co.,  
Bankers.

54 Wall Street,  
NEW YORK, 8th March 1904.

MESSRS. KESSLER & CO. LIM.  
Manchester.

DEAR SIRS, 2664

We have further placed in your escrow Note  
for \$25,000 5% interest bearing and Profit sharing  
due 1908 in the £6,000,000 Underground Electric  
Railways Co. of London Syndicate expiring Nov.  
1, 1904 with option of renewal 6 months. Those  
notes have Int. Coupons June and Decb. This col-  
lateral is to go against our drawing of £5,000 of  
March 1st.

The writer has had a dreadful time of it with a  
large abscess and only got back to business yester-  
day, still feels very weak and has lost 7½ lbs. in  
weight in 2 weeks.

2665 Gillett got back Saturday on the Lucania, not  
having achieved anything on a/c of war.

Yours truly,

KESSLER & Co.

KESSLER & Co.  
Bankers.

54 Wall Street,  
NEW YORK 21 March 1904.

Messrs. KESSLER & Co. Lim.  
Manchester.

DEAR SIRS,

2666 Having sold our Oklahoma Gas & Electric Stock  
we have withdrawn from your escrow of 1st Jan.  
1904 1484 Shares ..... \$37,100.  
and to-day placed in same

\$20,000 United Brewery

bonds ..... \$20,000.

"16,850 Certificates of  
last and final 10%  
payment on a/c of  
Chicago & Gt. West-  
ern 1st Mort. bonds  
at 89 .....

14,996.50

168½ shares Com. C. &

2667 Gt. W. 15 ..... 2,527.50

\$ 37,524.

Yours truly,

KESSLER & Co.

*Private*

2668

29th MARCH, 4

MESSRS. KESSLER & Co.,  
New York.

DEAR SIRs,

We note from your favor of 21st inst the alteration made in our escrow, list of 1st January /04, by the withdrawal of

1484 shares Oklahoma Gas & Electric Co. value \$37,100 and the substitution therefor of \$20,000 United Brewery Bonds and \$16,850 Cert of payment of call on C. & Gt. W. Bonds and 168½ shares C. & Gt. Wt. common of a combined value of \$37,524. 2669

The foregoing is in order.

Yours very truly,

KESSLER & Co. Limited

P. W. KESSLER, Director.

KESSLER & Co.  
Bankers.

54 Wall Street,  
NEW YORK, 22 April 1904

MESSRS. KESSLER & Co. Lim.  
Manchester.

DEAR SIRs,

2670

Please take note that Devlin paid off \$5,000 on his note of \$25,000 giving new note for \$20,000.

We have also sold \$2,000 of the \$25,000 London Underground notes.

To replace those, \$7,000 in your escrow we have placed 700 shares Medina Quarry Co. at 10, \$7,000.

Yours truly,

KESSLER & Co.



2671 *Private*

MAY 3rd 4.

MESSRS. KESSLER & Co.,  
New York.

DEAR SIRS,

We have your private lines of 22nd ulto and take note of the alteration made in our escrow, by the change in the Devlin note from \$25,000 to \$20,000 and by the sale of \$2,000 of the \$25,000 London Underground notes. Also that these reductions are replaced by 700 Medina Quarry Shares at 10.

Yours truly,

2672

KESSLER & CO. LIMITED.  
P. W. KESSLER, Director.

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pr "Lucania"

Recd. 3rd Sept. /04.

KESSLER & Co.  
Bankers.

54 Wall Street,  
New York, 26 Aug., 1904.

2673 Messrs. KESSLER & Co. Lim.  
Manchester.

DEAR SIRS,

The Denver & S. Western Tax receipt for \$25,073.81 has been paid off with interest at 6%, so we have taken it out of your escrow and replaced same by increase in value of Chicago Gt. Western syndicate, which agreement now calls for

\$222,450.— 1st Mortgage divisional bonds, which ought to be worth 2674

	80	\$177,960
and 750 shares at.....	15	11,250

	189,210
former value given you.....	175,230

Increase .....	13,980
and Equipment note of Midland	
Terminal R. R. At 6% .....	13,000

(nothing ahead of this note) ....	\$26,980
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Yours truly, 2675  
KESSLER & Co.

*Private*

6 Sept. 4

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We are in receipt of your private lines of 26th Augt. and note the alteration made in the securities deposited against our acceptances, which appear to be in order.

We are, dear Sirs,

2676

Yours truly,

KESSLER & Co., LIMITED.

P. W. KESSLER, Director.

2677 pr "Majestic"

KESSLER & Co.  
Bankers.

54 Wall Street,  
New York, 13 Sept., 1904.

Messrs. KESSLER & Co. Lim.  
Manchester.

DEAR SIRs,

2678 Having sold some more of the St. L. and San  
Frisco  $4\frac{1}{2}$  5 year notes which we were carrying  
through our long drawings on Anglo Foreign, we  
have taken out of your escrow part of the C. Gt.  
West Del Est. syndicate certificates leaving in your  
escrow certificate calling for

\$59,320 Bonds at 80.....	\$47,456
200 Shares stock at 15.....	3,000
We have further added to your escrow	
Note at 6% of Col. Trading & T. Co.....	30,000
Note at 6% Florence & Cripple Creek R. R. Co.....	33,000
Participation Cin. Ham. & Dayser 1 year loan pref. stock as Collateral.	45,000
\$34,000 St. L. & S. F. $4\frac{1}{2}$ % 5 y notes at 92.....	31,280

2679

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\$189,736

Yours truly,  
KESSLER & Co.

*Private.*

23 Sept. 4.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRS,

Your private lines of the 13th inst are duly to hand, and we take note of the new alteration in our escrow as specified by you.

At the end of the year you will kindly send us a complete list of the securities held for us, so that we may have a clean sheet to start the new year on and also be able to see that we agree.

We are, dear Sirs,

2681

Yours truly,

P. W. KESSLER.

2682

2683 *Private.*

KESSLER & Co.  
Bankers.

54 Wall Street,  
NEW YORK, 14 Oct., 1904.

Messrs. KESSLER & Co. Lim.  
Manchester.

DEAR SIRs,

Please take note of the following changes in your  
escrow:

Taken out:

	\$3,000 Underground El. of London notes .....	\$3,000
2684	\$20,000 Chas. J. Devlin note.....	20,000
	40,000 Hayfield & Octwein Ext. C. & G. W. syndicate certif. calling for	
	59,320 Bonds.....	47,456
	200 shares Stock.....	3,000
	\$78,000 Denver & Southwestern 1st....	28,280

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\$101,736

Put in:

	\$8,000 6 months note C. J. Devlin.....	\$8,000
	\$10,000 further participation Certif. C. H. & D. pfd. stock synd. ....	10,000
	\$25,000 Omaha & Sioux City Ext. Synd. calling for \$37,500 C. Gt. W. 1st	
2685	Mortgage bonds, 80.....	30,000
468	Shares pref. Cripple Creek Cen- tral, 75.....	35,000
390	Shares com. Cripple Creek Cen- tral, 35.....	13,650

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\$96,750

	200 Shares I. S. Red. & Ref. pfd. stock at bid price 25.....	5,000
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\$101,750

Yours truly,  
KESSLER & Co.

KESSLER & Co.  
Bankers.

54 Wall Street, 2686  
NEW YORK 20 Oct 1904

Messrs. KESSLER & Co. LIM  
Manchester

DEAR SIRs,

Please note following changes in your escrow  
*Taken out.*

\$55,000 C. H. & D. stock syndicate receipt .....		\$55,000	
34,000 St. L. & S. F. 5 y. 4-1/2% notes .....	92	31,300	
Park of note \$33,000—Florence & Cripple Creek .....		33,000	2687
Leaving .....	27,200	5,800	
		<u>\$92,100</u>	

*Put in.*

Note St. L and S. F. 6% due 1st Decr. 1904 .....		\$43,143.92	
800 Shares pfd U. S. Red. & Ref. Co. ....	35	28,000.	
Raise price 10 points on 200 sh. already in your escrow...		2,000.	
1,200 shares com U. S. Red. & Ref. Co. ....	17	20,400.	2688
		<u>\$93,543.82</u>	

Reduction earnings are improving  
daily bonds are 73 bid and demand for  
stocks at above prices has started.

KESSLER & Co.

2689 *Private*

24th Oct. 4.

Messrs. KESSLER & Co.  
New York.

DEAR SIRs,

Your private lines of the 14th inst are to hand and we note the fresh changes made in our escrow which appear to be in order, assuming that the Cripple Creek Central Shares are taken at the market value.

We are, dear Sirs,  
Yrs truly,

P. W. KESSLER.

2690

Your typist might be taught to write the name of his firm correctly See encl.

P. W. K.

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*Private*

29th Oct 4.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We are in due receipt of your favour of 20th Oct advising a further alteration in our escrow. The same is noted. On the whole the security would not appear to have improved this time. We trust the Reduction Co's stocks may reach a satisfactory figure soon to enable you to dispose of same.

2691

Yrs truly,

P. W. KESSLER.

Pr "Tavoli"

2692

KESSLER &amp; Co.

54 Wall Street,

Bankers.

NEW YORK

2 Nov 1904.

Messrs. KESSLER &amp; Co. LIM

Manchester.

DEAR SIRs,

Yesterday the St. Louis and S. Francisco exercised their option and took up the note in your escrow for \$43,143.82 and 6% int. Same is therefore withdrawn from your escrow and we have replaced same by

	Certificates of Indebted-				2693
	ness of the State of Colo-				
	rado .....			\$12,038.85	
	300 shares Medina Quar-				
	ry at .....	10		3,000.	
	200 " Columbia Riv-				
	er Packers ...	40		8,000.	
	10,000 " Elkton Mining				
	Co. ....	70		7,000.	
half stock	100 " Standard Rol-				
	ler Bearing {				
	6% pfd 75.. {				
	70 " do. com. 55 {			7,500.	
	(this latter is				
	worth 100)				2694
	100 " Chicago Ter-				
	minal Trans .	12		1,200.	
	200 " U. S. Leather				
	com .....	13		2,600.	
				\$41,338.85	

If exchange goes lower we shall gradually draw less.

Yours truly

KESSLER &amp; Co.



2695 *Private*

11th Nov. 4

Messrs. KESSLER & Co.  
New York.

DEAR SIRs,

The further alterations in our escrow advised by yours of 2nd inst, is duly noted.

The new securities are a curious looking bunch, and we are not very realizable.

Yours truly,

P. W. KESSLER.

2696

KESSLER & Co., Bankers,  
No. 54 Wall Street

Per S. S. "Kaiser Wilhelm Der Grosse"

NEW YORK November 21st 1904

DEAR WILLY:

In reference to the securities put into your escrow on the 2nd of November, they are not at all such a bad lot as you think. I, as a rule, have not written much about the different securities that we put into your escrow as it takes up too much time, and it is absolutely unnecessary; but as you make remarks about them, I must mention that

2697 MEDINA QUARRY stock of course will be slow.

COLUMBIA RIVER PACKERS is expected to pay a dividend in January, and if it does, it ought to be worth par.

ELNTON MINING Co. earned in the month of October \$25,000 net, and in November it is expected to do likewise. It is practically assured that dividends will commence again in December, at the rate of one-half per cent. a month. This will be one-half the amount that they used to pay when we first bought the stock, namely 1% a month. They, however, believe that in February or March they can begin the old 1% a month.

STANDARD ROLLER BEARING Co. preferred stock is 2698  
\$50 per share, and not \$100., and has been paying  
5% for the last seven years. On the Common stock  
they have not paid anything yet, but they are earn-  
ing at the rate of 40% per annum and a large  
bonus is expected in new stock.

STANDARD TERMINAL TRANSFER, which we put  
into you at 12, is selling to-day at 16.

UNITED STATES LEATHER, which we put into you  
at 13, is selling to-day at 15, and as this stock used  
to sell at \$45., and the leather Company, is now in a  
much better position than it was then, there is no  
reason why this stock should not double in value  
within the next two months. 2699

You will therefore see that your remarks are  
based on entirely wrong ideas.

ALFRED KESSLER.

Chicago Terminal & Leather were quite active  
on stock exchange to-day

8100 of the former from 15-1/2 to 16

40,500 of the latter from 14-1/4 to 15 and back to  
14-3/4

KESSLER & Co.

Bankers

54 Wall Street,

NEW YORK 4 Jan. 1905 2700

Messrs. KESSLER & Co LIM

Manchester.

DEAR SIRS,

We certify that we have specially set aside and  
hold for your account on this the 31st day of De-  
cember, 1904, as security for the drawing credit  
which you accord us, the following securities:

2428 Sh. United Lighting &		
Heating . . . . .	10	\$24,280.—
2352 shs. Daimler Mfg. Co. . . . .	50	117,600.—
56,000 United Brewery 1st 6% . .	100 b	56,000.—
50,000 do do notes 6% . .		50,000

2701	468 sh. Cripple Creek Central pfd	70	32,760.—
	390 " do com	30	11,700.—
	Note Chas. J. Devlin due Ap		
	13 1905 .....		8,000.—
	1,000 shs. Underground El of		
	London £5.....		
	2,000 shs. Underground El of		
	London £5 Beneficial Int }		25,000.—
	18,000 Notes Underground El		
	of London £5 Beneficial		
	Int at.....	97	17,460.—
	1,000 shs. Medina Quarry Co....		10,000.—
	Midland Terminal Equip		
2702	note .....		13,000.—
	Colorado Trading & Trans-		
	fer note.....		30,000.—
	Florence & Cripple Creek		
	note .....		27,200.—
	25,000 Omaha & Sioux City Ex-		
	tension Syndicate \$37,500		
	bonds .....		30,000.—
	1,000 shs. U. S. Red. & Ref. pfd..	40	40,000.—
	1,000 " do com..	18	18,000.—
	Sundry Certificates of Indebt-		
	edness of State of Colo-		
	rado .....		12,038.85
2703	70 shs. Standard Roller Bear-		
	ing com.....		
	100 shs. Standard Roller Bear-		
	ing pfd.....		7,500
	10,000 shs. Elkton Cons. Mining		
	Co. ....		7,000.—
	200 shs Columbia River Packers.	40	8,000.—
			<hr/>
			\$545,538.85
	You hold in addition to this		
	1606 Shares United Light & H..	10	16,060.—
			<hr/>
			\$561,598.85

Yours Truly,  
KESSLER & Co.

*Private*

17 Jan'y 1905.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We are in receipt of your private lines of the  
4th inst. giving a list of the securities set aside as  
cover for your drawing on us.

With our thanks.

We are, dear Sirs,

Yours very truly,

KESSLER & CO. LIMITED

P. W. KESSLER, Director.

2705

"Lucania"

KESSLER & Co.

Bankers.

54 Wall Street,

NEW YORK, 10 Feb 1905.

Messrs. KESSLER & Co. LIM  
Manchester.

DEAR SIRs,

Having sold all the London Underground notes,  
we have withdrawn \$18,000 at 97—\$17,460.—and  
have placed in escrow 150 shares First National  
Bank of Topeka at 120—\$18,000.—This Bank  
pays 7% dividends and is considered very good 2706  
property.

Yours truly,

KESSLER & Co.

*Private.*

21 FEBY 5.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We acknowledge receipt of your favour of the  
10th inst. advising exchange in our escrow of

- 2707 \$18,000 London Underground notes for 150 Shares  
First National Bank of Topeka, of which we take  
due not.

We are, dear Sirs,

Yours very truly,

KESSLER & Co., LIMITED,

P. W. KESSLER, Director.

---

KESSLER & Co.,

Bankers.

54 Wall Street,

NEW YORK, 6 March, 1905.

- 2708 Messrs. KESSLER & Co. Lim.  
Manchester.

DEAR SIRs,

In reply to your remark about the United  
Breweries notes of \$50,000 being long winded; they  
are indeed so as they are due

\$15,000	Sept. 1911	\$10,000	Sept. 17 1912
\$5,000	Sept. 1913	\$20,000	Sept. 1914

They are in the nature of being a debenture bond  
or 2nd Mortgage bond and was the best settlement  
we could obtain at time of reorganization.

- Please take note that the \$13,000—Midland Firm  
2709 Equip note and \$12,038.85 State of Colorado Cer-  
tif. of indebtedness have been paid off, the Re-  
duction stocks are active at 25 for the common and  
46 for the preferred this makes a difference in es-  
crow prices of \$6,000—on 1000 pfd. and \$7,000 on  
1000 common, we have to-day added 500 Shares  
more common to your escrow at 25—\$12,500—in  
substitution.

Yours truly,

KESSLER & Co.

2710

*Private.*

21st MARCH 5.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We duly received your favor of the 6th inst. advising withdrawal of notes

\$13,000 Mid. Firm Equip.

\$12,038.85 Col. State Cert.

from our escrow.

We note the manner in which you make this good and are glad to see the appreciation in the value of your Red. & Ref. Shares. We hope you<sup>2711</sup> may be able to realize profitably on some of them ere long.

Yours very truly,

KESSLER & Co., LIMITED,  
P. W. KESSLER, Director.

2712

2713 pr "New York"

KESSLER &amp; Co

Bankers

54 Wall Street,

NEW YORK, 13th April, 1905.

Messrs. KESSLER &amp; Co. Lim.

Manchester.

DEAR SIRs,

The following having been paid off, we have taken same out of your escrow, viz:—

	Florence & C. C. note.....	\$27,200.
	Col. Trad. & Transf. Note on a/c \$30,000.	4,500.
2714	Devlin note .....	8,000.

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 \$39,700.

We have not added to escrow owing to enhanced value of U. S. Reduction & Refining stocks.

	36 against 25 for common.....	\$16,500.
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	67 against 46 for pfd.....	21,000.
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 \$37,500.

Besides we are not drawing for original amount of escrow.

Yours truly,

KESSLER &amp; Co.

2715

*Private.*

25th APRIL 5.

Messrs. KESSLER &amp; Co.

New York.

DEAR SIRs,

We are in receipt of your favour of 13th inst advising withdrawals from our escrow, without replacement owing to enhanced value of the U. S. Red & Ref. stocks.

We are glad to note this appreciation and also the reduction in the amount of your drawings.

You know our desire in regard to this last and 2716  
trust that in the course of this year you may be  
able to give good effect to it.

Yours very truly,

KESSLER & Co., LIMITED,  
P. W. KESSLER, Director.

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KESSLER & Co.

Bankers

54 Wall Street,

NEW YORK, 15 May 1905.

Messrs. KESSLER & Co.

Manchester.

2717

DEAR SIRs,

We have withdrawn from your escrow

200 U. S. Reduction pfd. at 67.....	\$13,400.
-------------------------------------	-----------

500 U. S. Reduction com. at 36.....	18,000.
-------------------------------------	---------

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\$31,400

and have placed in same another 150

shs. of 1st Nat. Bank of Topeka at

120 .....	\$18,000.
-----------	-----------

Prices of Reduction Stock to-day are 31 for  
common and 63 for pref.

We refrained from putting anything else in the  
escrow, for in spite of these prices you have 2718  
\$537,000 collateral whereas our drawings are only  
\$480,000.

Yours truly,

KESSLER & Co.



2719 *Private.*

25th MAY 5

MESSRS. KESSLER & Co.  
New York.

DEAR SIRs,

We note from your letter of 15th May the further change in our escrow. The same seems in order.

We should be quite glad to see your drawings very considerable reduced, with a corresponding reduction in the escrow.

Yours very truly,

KESSLER & Co. LIMITED.  
P. W. KESSLER, Director

2720

7 Norfolk Street,  
MANCHESTER, 1st June, 1905.

Written at 260 West Broadway, New York.  
MESSRS. KESSLER & Co. LTD.,  
33 Dale Street,  
Manchester, Eng.

DEAR SIRs:

2721 I called at your New York house this morning and had produced for my inspection the following securities which are all deposited in the vault in escrow in your name and are likewise so described in their books. The only variation from the list you supplied to me appears to be the substitution of 150 shares of the First National Bank of Topeka for 200 Preferred and 500 Common Stock of the U. S. Reduction & Refining Co. The Common Stock (not bonds as you say on your list) of the Elkton Mining Co. is held by Messrs. Shove, Aldrich & Co., of Colorado for a/c Kessler & Co., and I had produced to me their last letter dated 29th May, 1905, enclosing the monthly dividend and which stated that \$5,000. of the stock was for

a/c Kessler & Co. and \$5,000. was for a/c A. Kess- 2722  
ler.

I have not attempted to verify the value of the  
stocks.

Yours faithfully,

FRANK YOUATT.

1st JUNE, 1905.

2428 Shares United Lighting & Heating Co. Com-  
mon Stock.  
2352 Shares Daimler Vehicle Co.  
\$56,000. United Breweries of Chicago 6% Mort-  
gage Bonds.  
\$50,000. United Breweries Long dated Notes. 2723  
468 Shares of Colorado & Cripple Creek Preferred  
Stock.  
390 Shares of Colorado & Cripple Creek Common  
Stock.  
1000 Shares London Underground £10 shares £5  
paid.  
2000 Shares London Underground Beneficial In-  
terest shares £1 ea fully paid.  
1000 Shares Medina Quarry Common Stock.  
\$25,500. Col. Trading & Transfer Co. Note \$150,-  
000 less already repaid \$24,500.  
\$25,000. Omaha & Sioux City Syndicate shares  
(This is being squared up to-day by payment of 2724  
85% in cash and certain stocks and bonds of the  
Chicago & Northwestern, amount not definitely  
known).  
800 shares U. S. Reduction & Refining Co. Pre-  
ferred Stock.  
100 shares U. S. Reduction & Refining Co. Com-  
mon Stock.  
70 shares Standard Roller Co. Common Stock.  
100 shares Standard Roller Co. Preferred Stock.  
\$10,000. Elkton Mining Co. Common Stock.  
200 Shares Columbia River Co. Common Stock.  
300 Shares 1st National Bank of Topeka Common  
Stock.

F. Y.

2725 KESSLER &amp; Co.

Bankers

54 Wall Street,

NEW YORK 2 June 1905

Messrs. KESSLER &amp; Co. Lim

Manchester.

DEAR SIRs,

The Chicago Gt. Western Syndicate having paid yesterday 85% we have withdrawn from your escrow ..... \$25,000

Omaha Sioux City Ext. bonds value.....	30,000
2726 and 300 shares pfd. U. S. Red & Ref. 63..	18,900

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\$48,900

and have placed in same Syndicate Certificate calling for \$164,392.50 Chicago St. West B. stock worth at to-day's price 31—\$50,961.67. The Syndicate managers state that these will not be sold under 40, and that probably in 3 months.

Yours truly,

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KESSLER & Co.

Private.

27th JUNE 5.

Messrs. KESSLER &amp; Co.,

2727

New York.

DEAR SIRs,

We safely received your favour of the 2nd inst and note the further withdrawal from and addition to our escrow therein advised.

As you realize your old holdings, we shall of course be pleased to see a contraction in the amount of your acceptances.

Yours very truly,

KESSLER &amp; Co. LIMITED.

P. W. KESSLER, Director.

KESSLER & Co.  
Bankers

2728

54 WALL STREET,  
New York 14th July, 1905

Messrs. KESSLER & Co., Lim  
Manchester.

DEAR SIRs,

Having made a few changes in your escrow since 1st July we beg to enclose new list of the escrow as it stands to-day with present quotations amounting to \$536,431.67. Some of the securities are paying dividends.

U. Breweries bonds.....6%	2729
do. Notes.....6%	

Cripple C. Cent Pfd 4% (Just declared 3% for 9 ms)

Col. Trading Note..... 6%

U. S. Red & Ref. pfd..... (6%)      commences  
Oct 1905

Standard Roller pfd.....6%

Elkton .....6% (1½% monthly)

Central Nat. Bk.....7%

Pikes Peak Hydro.....5%

Yours truly,

KESSLER & Co.

2730

2731 Escrow KESSLER & Co. Lim 14 JULY 1905.

	2428 Sh. United L. & Heat (10) .. 10	\$24,280.
	1606 " do. in Manchester, 10	16,060.
	2352 " Daimler Mfg. Co. .... 50	117,600.
	\$56,000 United Breweries Bonds .. 100	56,000.
	"50,000 do. Notes .. 100	50,000.
	468 Sh. Cripple Creek Central pfd, 70	32,760.
	390 " do. com., 33	12,870.
	1000 " London Underground £5 pd. . }	25,000.
	2000 " do Beneficial Ctf }	
	1000 " Medina Quarry ..... 5	5,000.
	\$25,500 Col. Trading & Transf. note ..	25,500.
	500 sh. U. S. Reduction & Ref. pfd 67	33,500.
2732	1000 " do do com 32	32,000.
	70 " Standard Roller Bearing Com }	7,500.
	100 " do do pfd }	
	10000 " Elkton Mining ..... 50	5,000.
	200 " Columbia River Packers .. 40	8,000.
	\$164,392.50 Hayfield & Octwein Syn.	
	Certif. calling for C. G. W. B's 31	50,961.67
	200 sh. Central Nat. Bk. Topeka 100	20,000.
	\$18,000 Pikes Peak Hydro El. Co. 1st	
	Mort 5% Jan. & July 1923 ..... 80	14,400.

\$536,431.67

KESSLER & Co.

2733

*Private*

25 JULY 5.

Messrs. KESSLER & Co.,

New York.

DEAR SIRs,

Your favour of 14th inst is to hand with a revised list of securities in our escrow, of which we take due note.

We are, dear Sirs,

Yours very truly,  
P. W. KESSLER.

KESSLER &amp; Co.

2734

Bankers.

54 Wall Street,

NEW YORK 23 OCT 1905

Messrs. KESSLER &amp; Co. Lim

Manchester.

DEAR SIRs,

Please take note that the Colorado Trading & Transfer note for \$25,500.— has been paid off with 6% interest to date. In place of above we have put in your escrow \$28,000 Pittsburg Westmoreland & Somerset 1st Mortgage 5% bonds at 90— \$25,200.—

Some changes of prices in your escrow list are: 2735

Cripple Creek Central com.....	40	Bid
C. Gt. Western B prf.....	36	"
U. S. Reduction prf.....	71	"
Elkton Mine .....	56	"

Yours truly,

KESSLER &amp; Co.

2736

2737 *Private*

2nd Nov. 5.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We note from your favour of the 23rd ulto that the Colorado T. & T. Co's note has been taken up and been replaced in our escrow by \$28,000. Pittsburg, Westmoreland and Somerset R. R. Co's 5% bonds. This seems to be a 1 horse sort of a line, dependent for its credit upon a lim. lib. Co. which we hope is sound.

2738 We note the improvement in some of the prices of the securities deposited. What are U. S. Red. & Ref. common worth now?

Yours very truly,

P. W. KESSLER.

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*Private*

KESSLER & Co.  
Bankers

54 Wall Street,  
NEW YORK 17 Nov. 1905.

2739 Messrs. KESSLER & Co. Lim  
Manchester.

DEAR SIRs,

Yours of 2nd Nov. to hand.

Estimated earnings of Pittsburg Westmoreland and Somerset are not including revenue from handling coal, as development will probably be gradual. This traffic will more than compensate for the future decline of the lumber industry and it is likely the revenue from handling coal will in time be the main source of income.

Passenger business based on 2 trains each way per day and extra train dur- ing summer say 50,000 train miles at 60 cents.....	\$30,000.—	
Forest products, logs for mill ties poles, pit props etc 5000 cars at \$5.—.	25,000.—	
Finished lumber 1300 cars at \$6....	7,800.—	
Char-coal 500 cars at \$8.....	4,000.—	
Gin merchandise, cattle, hay and farm products, agricultural imple- ments etc. 1900 cars at \$12.....	22,800.—	
Quarry products, limestone, blue- stone, sandstone, fireclay, etc. 1900 cars at \$6.—.....	11,400.—	2741
Other sources mail, express.....	5,000.—	
Total earnings.....	\$106,000.—	
Operating expenses 55%.....	58,300.—	
	47,700.—	
Fixed charges on \$500,000.....	25,000.—	
Surplus for stock.....	\$ 22,700.—	

These earnings are said to be a very low estimate but as the road will only be finished in December, 2742 we must wait and see. I presume the B. & O. will buy out the Co when finished.

U. S. Red. Com 29

" " " pfd 68-3/4 bid 69-1/2 asked.

KESSLER & CO.



2743 KESSLER & Co.  
Bankers

54 Wall Street,

NEW YORK 5 Jan 1906

Messrs. KESSLER & Co. Lim  
Manchester.

DEAR SIRs,

We certify that we have specially set aside and hold for your account on the 31st day of December 1905, as security for the drawing credit which you accord us, the following securities:

	2428 Shs. United Light & Heating..	10	\$24,280.—
	2352 " Daimler Mfg. Co.....	50	116,600.—
2744	56,000 United Breweries 1st 6's.....		56,000.—
	50,000 " 6% notes.....		50,000.—
	468 Shs. Cripple Creek Cent pfd	61	28,548.—
	390 " do " Com	41	15,990.—
	1,000 " Underground El of London..	}	25,000.—
	2,000 " " Beneficial Certf....		
	1,000 " Medina Quarry Co.....	5	5,000.—
	500 " United S. Red. & Ref. pfd	70	35,000.—
	1,000 " " " " com 30-1/2		30,500.—
	70 " Standard Roller Bearing....	}	7,500.—
	100 " do pfd.....		
	10,000 " Elkton Cons Mining.....	50	5,000.—
	200 " Columbia River Pkrs.....	40	8,000.—
2745	Hayfield & Octwein Syn calling for..		1,429.—
	\$164,392.50 Chicago Gt. West pfd B	35	57,537.37
	200 Shs. Cent. Nat Bk Topeka....	80	16,000.—
	\$ 18,000. Pykes Peak Hydro El 1st 5%		
		80	14,400.—
	\$ 28,000. Pittsburg West. & Somerset		
	1st 5.....	95	26,600.—
			<hr/>
			\$522,955.37

Lying with you

1,605 shs United Light & Heating 10 &16,060.—

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\$539,015.37

Yours truly,

KESSLER & Co.

*Private*

16th JANUARY 6

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We are in receipt of your favour of the 5th inst.  
with the list of the securities held in escrow for us  
against our drawing credit, of which we take note  
with thanks.

We are, dear Sirs,

Yours very truly,

P. W. KESSLER.

2747

KESSLER & Co.  
Bankers.

54 Wall Street,  
NEW YORK, 24 Aug. 1906.

## List of Kessler &amp; Co., Lim., Escrow.

2428 Shs. United Lighting & Heat . . . .	10	\$24,280	
1606 " " " in Manchester . . . .	10	16,060	
2352 " Daimler Mfg. Co. . . . .	50	117,600	
56,000 United Breweries 1st M G's . . . .	100	56,000	
50,000 do notes . . . . .	100	50,000	2748
1000 Shs. Underground El London L6 1/4 paid . . . . .			
2000 Shs. Underground Beneficial Cert. .		31,460	
70 " Standard Roller Bearing . . . .			
100 " " " pfd. . . . .		7,500	
10,000 Sh. Elkton Mining Co. . . . .	50	5,000	
200 " Columbia River Packers . . . .	40	8,000	
468 " Cripple Creek Central pf. . . .	70	32,760	
390 " do com. . . . .	90	35,100	
18,000 Pikes Peak Hydro El 1st 5's . . . .	80	14,400	

2749	500 Shs. U. S. Red. & Refining Co. pfd.	76	38,000
	1,000 " do com.	36	36,000
	23,000 Pittsburg West. & Somerset 1st		
	5's .....	95	21,850
	45,000 Notes of Orleans County Quarry		
	secured by \$60,000 1st M 5% of same		
	Company .....		
			<hr/>
			\$539,010

KESSLER & Co.

2750

*Private*

4th Sept. 6.

MESSRS. KESSLER & Co.,  
New York.

DEAR SIRs,

We have received through Mr. Alfred Kessler a revised list, dated 24th August, of the securities now set aside against your drawing credit on us.

We duly take note of these particulars and are dear Sirs,

Yours very truly,

2751

P. W. KESSLER.

KESSLER &amp; Co.

2752

Bankers.

54 Wall Street

New York 14 Sept. 1906.

Messrs. KESSLER &amp; Co., LIM.

Manchester.

DEAR SIRs,

Since our list of 24 Aug. of your escrow we have taken out

468 Shs. Cripple Creek cent. pfd	.....70	\$32,760
390 " do do do	.....90	35,100

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\$67,860 2753

and have substituted

20,000 Victor Fuel 1st 5's	.....90	\$18,000.
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25,000 Indiana Columbus &amp; East

Traction 1st 5's	.....90	22,500.
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22,000 Pitts. West &amp; Somerset 1st

5's	.....95	20,900.
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\$61,400.

In addition we have paid another in-

stalment on 1,000 London Under-

ground of £1:5 ..... 6,059.38

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now £7:10:0 paid ..... \$67,459.38 2754

Please take note of this change.

Yours truly,

KESSLER &amp; Co.

2755 *Private*

25th Sept. 6.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We have your favour of the 14th instant with particulars of further changes in our escrow, of which we take note.

The Victoria Fuel and Inda. Columbus & East Traction are new to us. Of the Pittsburgh West. & S. we have a good many now.

Yours very truly,

P. W. KESSLER.

2756

*Private*

2d October, 6.

Messrs. KESSLER & Co.  
New York.

DEAR SIRs,

In view of the approach of the end of the year and of the termination at that time of your present partnership contract, we think it right that we should notify you that in the future, we shall not be able to accord you the same large drawing facilities that we have been pleased to place at your disposal in the past. Circumstances have much changed and we shall, after this year, have to ask you to limit your drawings to an amount more in accordance with general usage.

2757

In view of possible negotiations that you may have in hand we think it proper that you should have this notification.

We are, dear sirs,

Yours very truly,

P. W. KESSLER.

*Private*

2758

KESSLER & Co., Bankers.  
No. 54 Wall Street.

Per S. S. "La Provence"

New York, October 3rd, 1906.

Messrs. KESSLER & Co., Ltd.,  
33 Dale Street,  
Manchester, Eng.

DEAR SIRS:—

In reply to your private lines of the 25th of September, the Victor Fuel Company Bonds are an issue taken by Clark, Dodge & Co., of \$2,000,000. 5% First Mortgage Bonds, due 1953. Agreement was dated 1st of March, 1906, and expires March, 1907. We took a participation in this of \$100,000, bonds at 90 and interest. So far, they have sold a little over \$1,600,000, leaving about \$400,000 for sale, which pro rata would exactly represent the 20 bonds we have. The Company is doing very well and earning about six times the interest on these bonds. 2759

*Indiana, Columbus & Eastern Traction Co.* This is an issue of \$4,900,000. General Refunding 5% Bonds due 1926, and is the syndicate formed by Drexel & Co. We took a participation of \$100,000, at 88½ and interest, with an agreement with the Bankers to give up half, viz., \$50,000 of bonds, to them on an option due first of January, 1907, at the same price. This syndicate lasts until July 1st, 1907. We have so far had to take up 25 of the bonds, and are writing to-day to Messrs. Drexel & Co., Philadelphia, to hear how the sale of the bonds has been getting on. The company is a trolley line similar to the Indianapolis & Northwestern, which bonds we had some time ago in the syndicate with Rollins, on which we made 5% interest on the bonds plus 3% commission. 2760

We take note of what you say in regard to Pittsburgh, Westmoreland & Somerset. They paid their

2761 coupons on the 1st of October and the Road is doing well.

Yours very truly,

KESSLER & Co.

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KESSLER & Co.

Bankers.

54 Wall Street,

New York, 19 Nov. 1906.

Messrs. KESSLER & Co., Lim.

Manchester.

DEAR SIRs,

Having sold \$13,000 Indiana, Columbus & Eastern Traction 1st Mortgage bonds, value \$11,700—  
2762 We have withdrawn same from your escrow and have put in their place 475 shares Green Consolidated Copper at 26—\$12,350. The par value is \$10 and the stock pays 24% p. s. and is very active on the curb market.

Yours truly,

KESSLER & Co.

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*Private*

1st Dec. 6.

Messrs. KESSLER & Co.,

New York.

2763 DEAR SIRs,

Your favour of the 19th ulto. advising a change in our escrow, has been safely received and the change has been duly noted by us.

Yours very truly,

P. W. KESSLER.

## MEMORANDUM.

2764

From KESSLER &amp; Co.,

Bankers,

54 Wall Street,

New York Dec. 31, 1906

To KESSLER &amp; Co., LIM

Manchester.

2428 Sh. United Lighting & Heat		
at .....	10	\$24,280.—
1606 Sh. United Lighting & Heat		
in Manchester .....	10	16,060.—
2352 Sh. Daimler Mfga. Co. ....	50	117,600.—
56,000 United Breweries 1st M.		
6½ .....	100	56,000.—
50,000 do. Notes ..	100	50,000.—
1000 sh. Underground El. Ldn. }		2765
£7-1½ paid .....		3,519.38
2000 sh. Underground Benefi-		
cial Cert. .... }		
70 sh. Standard Roller Bear-		
ing .....		7,500.—
100 sh. Standard Roller pfd. }		
100,000 sh. Elkton Mining Co. ....	68	6,800.—
\$18,00 Pike's Peak Hydro El 1st		
5½ .....	80	14,400.—
500 sh. U. S. Red & Ref. Co. pfd. .	70	35,000.—
1000 " do do com. .	29	29,000.—
\$45,000 Pittsbg. West. & Somerset		
1st 5½ .....	95	42,750.—
45,000 Notes of Orleans County }		2766
Quarry secured by \$60,000 1st		45,000.—
M 5% of same Company .... }		
12,000 Ind. Col. & East. Tract.		
1st .....	90	10,800.—
288 sh. Muskogee Gas & Elect.		
Com .....	10	2,880.—
288 sh. Muskogee Gas & Elect.		
Pfd .....	30	8,640.—
\$10,000 Muskogee Gas & Elect.		
Refdg .....	85	34,000.—

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 \$538,229.38

KESSLER &amp; Co.



2767 *Private*

1st March 7

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We are in receipt of your favor of the 18th ulto giving particulars of a change in our escrow of which due note is taken.

Yours very truly,

P. W. KESSLER.

---

 Private

9th Jany. 7

2768 Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We are in receipt of the new list of securities which you hold in escrow for us against our drawing credit and the same appears to be in order.

Yours very truly,

P. W. KESSLER.

We anticipate that you will give effect to our desire to have the amount of draft on us reduced.

2769

per "Majestic"

2770

54 Wall Street,  
New York 18 Feb 1907

KESSLER & Co.  
Bankers.

Messrs. KESSLER & Co., LTD.,  
Manchester.

DEAR SIRS.

We beg to notify you that we have	
withdrawn . . . . .	\$18,000 —
Pikes Peak Hydro Electric 1st 5%	
bonds . . . . .	\$14,400
and have placed in your escrow	
\$3,000—Muskogee Gas & El 1st and	2771
Ref 5% bonds at 85 . . . . .	2,550
and a final payment on 1000 Shares	
Underground El of London of £2.10	
per share . . . . .	12,143.75
	<hr/>
	14,693.75

We are informed that the Muskogee Plant is earning more than twice the interest on the bonds, which insures the 6% div. on the preferred stock of which there is only \$280,000. outstanding and which is the total issue.

Yours truly,

2772

KESSLER &amp; Co.

2773 K. W. II

KESSLER &amp; Co.

Bankers.

54 Wall Street,

New York 8th July 1907.

Messrs. KESSLER &amp; Co. LIM

Manchester.

DEAR SIRs,

We have withdrawn from your escrow

1,000 Muskogee Gas &amp; El . . . . . \$ 850 —

60,000 Orleans Quarry with note for

\$40,000 . . . . . 45,000 —

---

\$45,850 —

and placed in same

2774 \$40,000 Synd Participation Western

Pacific 1st Mortgage 5% bonds

paid in . . . . . } 7,234.38

548 Ch. Gt. W. Pfd. B at 16 . . . . . 8,768 —

and Title deed to 1018, 1020, 1022

Bedford Ave. Property, Brooklyn

so called Mackay Mortgage—1018

and 1022 are free and clear; there

is a mortgage on 1020 for \$9,000

out standing. We are bid \$42,000

and are asking \$47,500 . . . . . } 31,000 —

---

\$47,002.38

2775

KESSLER &amp; Co.

*Private*

16 July 7

Messrs. KESSLER &amp; Co.,

New York.

DEAR SIRs,

We note from your favour of the 8th instant the alteration made in our escrow. We do not know that Real Estate is just the thing for an escrow of this sort, but we hope you may soon get your price for it and so iliminate it from your assets.

Yours very truly,

P. W. KESSLER.

KESSLER & Co.,  
Bankers.

54 Wall Street,  
New York 27 Aug 1907.

2776

Messrs. KESSLER & Co. LIM  
Manchester.

DEAR SIRs,

A few days ago we sold at 90½ and Int \$20,000 Muskogee Gas & El. Bonds and withdrew them from your escrow replacing them by \$20,000 Orleans County Quarry bonds 1st 6% 's at 90.

We cabled you to-day we had drawn £20,000 60 d/s on your goodselves and have placed in a separate escrow against this the following:

\$25,000 Orleans Co. Quarry 1st 6s at 90..	\$22,500	2777
Note \$10,000 Orleans Co. Quarry secured by bonds at 75 Nov. 7.....	10,000	
Note \$10,000 Orleans Co. Quarry secured by bonds.....	10,000	
Note \$4,775 Orleans Co. Quarry secured by bonds Nov. 18.....	4,775	
Note \$8,000 R. B. Maclea Co. Due Dec. 5.	8,000	
Note \$7,000 " " "	7,000	
Note \$5,000 " " "	5,000	
Note \$16,000 Milne Turnbull & Co. Nov. 11	16,000	
Note \$17,000 " Dec. 27	17,000	
Note \$7,000 " " "	7,000	
	<hr/>	
	\$107,275	2778

Yours truly,

KESSLER & Co.

*Private*

4th Sept. 7

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We note from your favour of the 27th ulto. the change you have made in our escrow.

We also take note of the securities which you

2779 have lodged in a new separate escrow against your special drawing of £20,000 about which you cabled us and which you advise in your ordinary correspondence received to-day.

We anticipate that this special drawing will not be renewed and that your drafts on us generally will presently come to a more moderate level.

Yours very truly,

P. W. KESSLER.

KESSLER & Co.

Bankers

54 Wall Street

New York 23 Sept 1907

Messrs. KESSLER & Co., LIM.,

2780

Manchester.

DEAR SIRs,

In regard to your escrow for the recently drawn £20,000 We beg to say we have withdrawn the two Orleans County Quarry, 2 notes for each \$10,000 and bonds as collateral . . . . . \$20,000 and have replaced same by

200 Shares Com Cripple Creek Cent. at

67 . . . . . 13,400

200 Shares pfd Cripple Creek Cent. at 67. 13,400

\$26,800

of which please take note.

2781

Yours truly,

KESSLER & Co.

*Private*

2nd Oct 7

Messrs. KESSLER & Co.,

New York.

DEAR SIRs,

Your favour of the 23rd instant is to hand and we take note of the change made in our supplementary escrow.

Yours very truly,

P. W. KESSLER.

KESSLER & Co.  
Bankers.

54 Wall Street, 2782  
NEW YORK 2nd Oct 1907.

MESSRS. KESSLER & Co., Lim.,  
Manchester.

DEAR SIRS,

We have again withdrawn from your £20,000  
escrow \$8,000 Note of the R. B. Maclea Co.

7,000                      do                      do

\$15,000 and have replaced same with

166 shares Cripple Creek pfd at 67..\$11,122

100                      do                      com                      do.. 6,700

\$17,822 2783

Please take note of this change.

Yours truly,

KESSLER & Co.

*Private*

11th Oct 7

MESSRS. KESSLER & Co.,  
New York.

DEAR SIRS,

We are in receipt of your favour of the 2nd inst.  
advising withdrawal of \$15,000 in notes of R. B.  
Maclea & Co. from our escrow for £20,000 and re-  
placement by 166 Pfd Shares of the C. C. C. Rye. 2784  
and 100 Com. do. do. of which we take note.

How does our old escrow stand in view of the  
fire at the Daimler Works? Can the shares be  
said to be worth anything like the value set against  
them?

Has anything been done with the Mackay Mort-  
gage?

As anything in our escrow is realized, we should  
much like to see a corresponding reduction in your  
drawings. We hope this may be attainable.

Yours very truly,

P. W. KESSLER,

2785 KESSLER &amp; Co.

54 Wall Street  
NEW YORK 25th Oct. 1907.MESSRS. KESSLER & Co., Lim.,  
Manchester.

DEAR SIRs,

We handed Mr. Henry Kessler to-day, your two escrows, as per list enclosed, please cancel old list. You will notice we have put Daimler pfd in your escrow in place of common. We think eventually we ought to get something for the common stock too.

2786 Mr. Henry Kessler took a separate vault box for these escrows and Mr. Albert Kessler, Otto G. Kessler and North McLean have access to same. The box is in name of K & C Lim Manchester No. 2097.

Yours truly,

KESSLER &amp; Co.

## Escrow Kessler &amp; Co., Ltd. Manchester.

2428 sh. United Lighting & Heat	10	\$24,280.—
1606 " " in Manchester	10	16,060.—
1341 " Daimler Mfg. Co., pfd..	100	134,100.—
\$56,000 United Breweries M. 6's	80	44,800.—
2787 \$50,000 " Notes		50,000.—
1000 sh. Underground El: Ldn	}	
full paid.....		
2000 sh. Underground El: Bene-	}	49,663.13
ficial Cert. ....		
70 sh. Standard Roller Bearing		
\$50 share .....	60	4,200.—
100 " " " Pfd.....	50	5,000.—
10,000 sh. Elkton Mining Co.....	50	5,000.—
500 sh. U. S. Red. and Ref. Co. pfd.	25	12,5000.—
1,000 sh. " " com	10	10,000.—
\$45,000 Pittsburg, Westmoreland &		
Som. 1st 5's .....	95	42,750.—

12,000 Ind. Col. & East Tract 1st	90	10,800.—	2788
288 sh. Muskogee Gas & Elect.			
Com .....	20	5,760.—	
288 sh. Muskogee Gas & Elect.			
Pfd .....	60	17,280.—	
\$22,000 Muskogee Gas & Elect.			
Refdg .....	87	19,140.—	
Bedford Avenue property .....		31,000.—	
Western Pacific Syn. rect.....		7,234.38	
548 sh. Chicago, Git. Westn Pfd B	10	5,480.—	
\$20,000 Orleans County Quarry			
Co. 1st .....	90	18,000.—	
		<hr/>	
		\$513,047.41	2789

Kessler & Co., Ltd., Special Escrow £20,000—			
60 d/s			
\$25,000 Orleans County Quarry..		\$22,500.—	
Note, Milne, Turnbull & Co. due			
Nov. 11 .....		16,000.—	
Note, Milne, Turnbull & Co. due			
Dec. 27 .....		7,000.—	
Note, Milne, Turnbull & Co. due			
Dec. 27 .....		17,000.—	
Note, R. B. Maclea Co. due Dec. 5		5,000.—	
300 sh. Cripple Creek Com. ....	67	20,100.—	2790
466 sh. Cripple Creek Pfd .....	"	31,222.—	
		<hr/>	
		\$118,822.—	



2791 **Kessler & Co., Ltd., Ex. B, Dec. 2/07.**  
**J. O. N.**

Cable Address  
 TYZEPHYRA  
 New York.

P. O. Box 1105

KESSLER & CO., BANKERS.

No. 54 Wall Street.

Per S. S. "*Oceanic*."

NEW YORK, June 30th, 1903.

Messrs. KESSLER & Co., Ltd,  
 Manchester.

2792 DEAR SIR:—

In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe deposit vaults the following securities, package marked, "Escrow for account of Kessler & Co., Limited, Manchester:"

1484 shares Oklahoma Gas & Electric Co., at .....	25	\$37,100.
2428 shares United Lighting & Heating Co., at .....	12	29,136.
2352 shares Daimler Manufacturing Company, at .....	50	117,600.
2793 \$373,000 United Breweries Co. first 6s, at .....	65	242,245.
		<hr/>
		\$406,081.

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige

Yours very truly,

KESSLER & CO.

**Kessler & Co., Ltd., Ex. J, Dec. 11/07, 27**  
**J. O. N.**

KESSLER & Co. p. *Kais. Wilh. II.*  
 Bankers.

54 Wall Street.

No. 210 NEW YORK, Oct. 28th, 1907.

Cable Address:

TYZEPHYRA, New York.

MESSRS. KESSLER & Co. Ltd.  
 Manchester.

DEAR SIR:—

We confirm our last respects of No. 209 and beg to acknowledge receipt of your favor of the 15th inst., contents of which are duly noted.

We beg to advise having received Ch. \$627.14 from J. W. Goddard & Sons for which please debit us at 483 with £129-16-10 and we have paid by cash \$350 to Mr. E. W. Seidler, for which please credit at 481-1/2 with £72-13-9 both for account of Bradford.

We have further paid \$25 to the North America & Safe Deposit Co for which please credit us at 480 £5-4-2.

We remain, dear Sirs,

Yours truly

Please draw on Nov 6th £20,000 Ch on Messrs Glyn & Co London & oblige dear sir

Yours truly

ALB. KESSLER.

Adved B'ford  
 5/11/07  
 W 133

W  
 133

2797 **Kessler & Co., Ltd., Ex. P, Dec. 11/07,**  
**J. O. N.**

KNOW ALL MEN BY THESE PRESENTS that, WHEREAS ALFRED KESSLER, RUDOLPH F. FLINSCH and WILLIAM K. GILLETT individually and as co-partners, composing the firm of KESSLER & COMPANY, Bankers and Brokers of No. 54 Wall Street, Manhattan, New York City, are justly and truly indebted to Kessler & Company Limited, England, in the sum of Four hundred thousand Dollars (\$400,000.00) and upwards, and

2798 WHEREAS the said firm of Kessler & Company of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company Limited of Manchester, England, certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company Limited, in the safe deposit vaults in the North American Safe Deposit Company in the City of New York, and are now in the possession of and under the sole control of Kessler & Company, Limited. Now, in order that the securities comprising such collateral may be from time to time exchanged or replaced without in any way impairing the total value of the securities so deposited as collateral to the said indebtedness, the said Kessler & Company, Limited of Manchester, England, does hereby  
2799 make, constitute and appoint as its agents for it specified the following gentlemen: ALFRED KESSLER and OTTO G. NESTLE and the said Kessler & Company, Limited, of Manchester, England, does hereby authorize and empower the said ALBERT KESSLER and OTTO G. NESTLE and each of them, from time to time as may be requested by Kessler & Company of Manchester, England, to allow any person, corporation or co-partnership to replace the securities so pledged as collateral to the indebtedness of Kessler & Company of New York to Kessler

& Company Limited of Manchester, England, by 2800  
other securities, providing that the total value of  
the said collaterals is not thereby lessened, except  
in proportion as the indebtedness is from time to  
time reduced, or as the same may vary from time  
to time.

IN WITNESS WHEREOF the said Kessler & Com-  
pany Limited of Manchester, England, has caused  
these presents to be signed in its corporate name  
by Henry Kessler, Chairman of the Board of Di-  
rectors and of the Company, this 30th day of  
October, 1907.

KESSLER & COMPANY.

Limited.

2801

[SEAL]

T. H. KESSLER,

Director.

Sworn and subscribed to before me }  
this 30th day of Oct., 1907. }

PHILIP F. W. AHRENS,

Notary Public.

We, the undersigned, ALBERT KESSLER and OTTO  
G. NESTLE, do hereby accept the trust and agency  
conferred upon us by Kessler & Company Limited  
of Manchester, England, and agree to act faithfully  
as agents of the said Kessler & Company Limited,  
in the premises.

2802

IN WITNESS WHEREOF we have hereunto subscrib-  
ed our names this 30th day of October, 1907.

ALBERT KESSLER.

OTTO G. NESTLE.

STATE OF NEW YORK, { ss.:  
County of New York, }

On this 30th day of October in the year 1907  
before me personally came ALBERT KESSLER and  
OTTO G. NESTLE, to me known to be the individ-  
uals described in and who executed the within in-

2803 strument, and severally acknowledged that they executed the same for the purposes therein mentioned.

PHILIP F. W. AHRENS,  
Notary Public,  
New York County.

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**Kessler & Co., Ltd., Ex. T, Dec. 11 07,  
J. O. N.**

2804 KNOW ALL MEN BY THESE PRESENTS that, Whereas, Alfred Kessler, Rudolph E. F. Flinsch and William R. Gillett, individually and as copartners, composing the firm of KESSLER & COMPANY, Bankers and Brokers, of No. 54 Wall Street, Manhattan, New York City, are justly and truly indebted to Kessler & Company, Limited, of Manchester, England, in the sum of Five hundred thousand Dollars (\$500,000.00) and upwards, and

2805 WHEREAS, the said firm of Kessler & Company, of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company, Limited, of Manchester, England, certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company, Limited, in the safe deposit vaults in the North American Safe Deposit Company, in the City of New York. Now in order that the securities comprising such collateral may be from time to time exchanged or replaced by the said Kessler & Company, of New York, without in any way impairing the total value of the securities so deposited as collateral to the said indebtedness, the said Kessler & Company, Limited, of Manchester, England, does hereby make, constitute and appoint as its agents for it and in its behalf, to act for the purposes hereinafter specified, the following gentlemen: Albert Kessler and Otto G. Nestle, and the said Kessler & Company, Limited, of Manchester, Eng-

land, does hereby authorize and empower the said 2806  
 Albert Kessler and Otto G. Nestle, and all or each  
 of them, from time to time as may be requested by  
 Kessler & Company, of New York, to allow the said  
 Kessler & Company to replace the securities so  
 pledged as collateral to the indebtedness of Kessler  
 & Company, of New York, to Kessler & Company,  
 Limited, of Manchester, England, by other  
 securities, providing that the total value of the said  
 collaterals is not thereby lessened, except in proportion  
 as the indebtedness is from time to time reduced,  
 or as the same may vary from time to time.

IN WITNESS WHEREOF the said Kessler & Company,  
 Limited, of Manchester, England, has caused 2807  
 these presents to be signed in its corporate name by  
 Henry Kessler, Chairman of the Board of Directors  
 and of the Company, this 25th day of October, 1907.

KESSLER & COMPANY, LIMITED,

HENRY KESSLER,

Director.

Sworn and subscribed to }  
 before me this 26th day }  
 of October., 1907.

PHILIP F. W. AHRENS,

Notary Public.

We, the undersigned, North McLean, Albert 2808  
 Kessler, Otto G. Nestle, do hereby accept the trust  
 and agency conferred upon us by Kessler & Company,  
 Limited, of Manchester, England, and agree  
 to act faithfully as agents of the said Kessler &  
 Company, Limited, in the premises.

IN WITNESS WHEREOF, we have hereunto subscribed  
 our names this 25th day of October, 1907.

NORTH McLEAN,

ALB. KESSLER,

OTTO G. NESTLE.

2809 STATE OF NEW YORK, }  
County of New York, } ss. :

On the 26th day of October, in the year 1907, before me personally came North McLean, Albert Kessler and Otto G. Nestle, to me known to be the individuals described in, and who executed the within instrument, and severally acknowledged that they executed the same for the purposes therein mentioned.

PHILIP F. W. AHRENS,  
Notary Public,  
New York County.

2810

2811

**Kessler & Co., Ltd., Ex. V, Dec. 31/07, 2812**  
**J. O. N.**

32250

KESSLER &amp; Co.

Due 8th Novr.

Exchange for  
 £5000—

New York, Aug. 27, 1907.

Sixty days after sight of this First of Exchange  
 (second unpaid), please pay to the order of  
 J. & P. Coats Ltd.

Five thousand pounds Sterling  
 Value received and charge the same to account. 2813

To MESSRS. KESSLER & Co., }  
                   LIMITED                    } KESSLER & Co.,  
 No. 202542 Manchester, } 15/6 J.D.W. 8 Nov. 1907  
                   Payable London }

No. 291 Stamped £2.10.0.

Advised per Str. Oceanic. Accepted 6th September,  
 1907.

A 441 &amp; 90/165

Payable at Lloyds Bank, Limited  
 71, Lombard St., London  
 KESSLER & Co., LIMITED  
 H. KESSLER, Director.

Crossed Parr's Bank, Limited 2814  
 Not negotiable

Endorsed: For J. & P. Coats, Limited, W. P.  
 Stewart, Director; Alex. J. D. Tait, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted creditors  
 for £5,000.15.6 in respect of this acceptance  
 and protest.

Kessler &amp; Co., Lim., in Liquidation.

FRANK YOUATT,  
 Liquidator.

December 4th, 1907.

Refer to acceptor



2815 **Kessler & Co., Ltd., Ex. W, Dec. 31/07,  
J. O. N.**

Refer to acceptor 32251 Due 8th Novr.  
Exchange for KESSLER & Co.  
£5000.— New York, Aug. 27th, 1907.  
Sixty days after sight of this FIRST of EXCHANGE  
(second unpaid), please pay to the order of  
J. & P. Coats, Ltd., .....  
Five Thousand pounds ..... Sterling.

Value received and charge the same to account.  
To MESSRS. KESSLER & Co.,

2816 LIMITED KESSLER & Co.,  
Manchester 15/6 J.D.W. 8 Nov. 1907  
No. 202543 Payable London.  
No. 292 Stamped £2.10.0.

Advised per Str. Oceanic. Accepted 6th September, 1907.

A 441 & 90/166

Payable at Lloyds Bank, Limited  
71, Lombard St., London

KESSLER & Co., LIMITED

H. Kessler, Director.

Crossed Parr's Bank, Limited

Not negotiable

2817 Endorsed: For J. & P. Coats, Limited, W. B. Stewart, Director; Alex. J. D. Taitt, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted creditors for £5,000.15.6 in respect of this acceptance and protest.

Kessler & Co., Lim., in Liquidation.

FRANK YOUATT,

Liquidator.

December 4th, 1907.

**Kessler & Co., Ltd., Ex. X, Dec., 31/07, 2818**  
**J. O. N.**

32253

KESSLER &amp; CO.

Due 8th Novr.

Exchange for  
 £5000.—

New York, Aug. 27, 1907.

Sixty days after sight on this FIRST of EXCHANGE  
 (second unpaid), please pay to the order of  
 J. & P. Coats, Ltd., .....  
 Five Thousand pounds ..... Sterling. 2819  
 Vaule received and charge the same to account.

To Messrs. KESSLER &amp; Co.,

LIMITED

Manchester

Payable London

KESSLER &amp; Co.,

15/6 J.D.W. 8 Nov. 1907

No. 202544

No. 293 Stamped £2.10.0.

Advised per Str. Oceanic.

A441 &amp; 90/167 Accepted 6th September, 1907.

Payable at Lloyds Bank, Limited

71, Lombard St., London

KESSLER &amp; Co., LIMITED

H. KESSLER, Director.

Crossed Parr's Bank, Limited

2820

Not negotiable

Endorsed: For J. & P. Coats, Limited, W. P.  
 Stewart, Director; Alex. J. D. Taitt, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted credi-  
 tors for £5,000.15.6 in respect of this acceptance  
 and protest.

Kessler &amp; Co., Lim., in Liquidation.

FRANK YOUATT,

Liquidator.

December 4th, 1907.

Refer to acceptors

2821 **Kessler & Co., Ltd., Ex. Y, Dec. 31/07,  
J. O. N.**

Due 8th Novr.

32253

Refer to acceptors

Exchange for  
£5000.—

KESSLER & Co.

New York, Aug. 27, 1907.

Sixty days after sight on this FIRST of EXCHANGE  
(second unpaid), please pay to the order of

J. & P. Coats, Ltd., .....

2822

Five Thousand pounds ..... Sterling.

Value received, and charge the same to account

To Messrs. KESSLER & Co.,

LIMITED

Manchester

payable London

No. 202545

No. 294 Stamped £2.10.0

KESSLER & Co.,

15/6 J.D.W. 8 Nov. 1907

Advised per Str. Oceanic. Accepted 6th September, 1907.

A 441 & 90/168

Payable at Lloyds Bank, Limited

71, Lombard St., London

KESSLER & Co., LIMITED

2823

H. Kessler, Director.

Crossed Parr's Bank, Limited

Not negotiable

Endorsed: For J. & P. Coats, Ltd., W. P. Stewart,  
Director; Alex. J. D. Taitt, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted creditors for £5,000.15.6 in respect of this acceptance and protest.

Kessler & Co., Lim., in Liquidation.

FRANK YOUATT,

Liquidator.

December 4th, 1907.

**Kessler & Co., Ltd., Ex. Z, Dec. 31/07, 2824**  
**J. O. N.**

Exchange for  
 £2500

KESSLER & Co.

New York July 31 1907

Ninety days after sight of the FIRST OF EX-  
 CHANGE (second unpaid) please pay to the order of  
 Anglo South American Bank Ltd twenty-five hun-  
 dred pounds Sterling Value received and charge  
 the same to account

To MESSRS. KESSLER & CO.,

KESSLER & Co.

LIMITED

Accepted 12th

Manchester

August 1907 payable at

2825

payable London

Lloyds Bank Limited

71 Lombard St. Lon-  
 don

No. 202121

KESSLER & Co.

LIMITED. P. W. Kess-  
 ler Director

Indorsed: The Anglo South American Bank Ltd.  
 (formerly The Bank of Tarapaca and Argentina  
 Ltd) A. J. Symons, Manager N. S. Sweet Sub. Ac-  
 countant.

On the thirteenth day of November in the year of  
 our Lord one thousand nine hundred and seven at  
 the request of The Anglo South American Bank 2826  
 Limited London—I William Crawley of the City  
 of London, Notary Public duly admitted and sworn  
 exhibited the original Bill of Exchange before  
 copies to a Porter in the Bankinghouse of Lloyds  
 Bank Limited No. 71 Lombard Street, London,  
 where the said Bill is accepted payable and de-  
 manded payment of its contents WHICH DE-  
 MAND was not complied with but the said Porter  
 thereunto answered "Refer to Acceptors."

WHEREUPON I the said Notary at the request  
 aforesaid have protested and by these presents do

7827 solemnly protest against the Drawers and Acceptors of the said Bill and all others concerned for Exchange Re-Exchange and all Costs, Damages, Interest and Charges already incurred and to be hereinafter incurred for want of payment of the said Bill.

THUS DONE and protested in London aforesaid in the presence of Percy Watson Walker and Francis F. McArdle, Witnesses.

In testimonium Veritatis

WM. CRAWLEY

Not. Pub.

2828

**Kessler & Co., Ltd., Ex. AA, Dec. 31/07,  
J. O. N.**

Exchange for  
£2500

KESSLER & Co.

NEW YORK July 31 1907.

Ninety days after sight of the First of Exchange (second unpaid) please pay to the order of Anglo South American Bank Ltd twenty-five hundred pounds Sterling Value received and charge the same to account

To MESSRS. KESSLER & CO.,

KESSLER & Co.

LIMITED

Accepted 12th August

2826

Manchester

1907 payable at Lloyds

payable London

Bank Limited 71 Lombard St. London.

No. 202122

KESSLER & Co. LIMITED.

P. W. KESSLER

Director

Indorsed: The Anglo South American Bank Ltd. (formerly The Bank of Tarapaca and Argentina Ltd) A. J. Symons, Manager. N. S. Swce, Sub. Accountant.

On the thirteenth day of November in the year of our Lord one thousand nine hundred and seven

at the request of The Anglo South American Bank 2830  
 Limited London—I, William Crawley, of the City  
 of London, Notary Public, duly admitted and sworn  
 exhibited the original Bill of Exchange before  
 copies to a Porter in the Bankinghouse of Lloyds  
 Bank, Limited, No. 71 Lombard Street, London,  
 where the said Bill is accepted payable and demand-  
 ed payment of its contents WHICH DEMAND was not  
 complied with, but the said Porter thereunto an-  
 swered "Refer to Acceptors."

WHEREUPON, I the said Notary, at the request  
 aforesaid, have protested and by these presents do  
 solemnly protest against the Drawers and Ac-  
 ceptors of the said Bill and all others concerned 2831  
 for Exchange, Re-Exchange and all Costs, Dam-  
 ages, Interest and Charges already incurred and to  
 be hereinafter incurred for want of payment of  
 the said Bill.

THUS DONE and protested in London aforesaid  
 in the presence of Percy Watson Walker and  
 Francis F. McArdle, Witnesses.

In testimonium Veritatis,

WM. CRAWLEY,  
 Not. Pub.

2833 **Kessler & Co., Ltd., Ex. BB, Dec. 31/07,  
J. O. N.**

Exchange for  
£2500

KESSLER & Co.  
NEW YORK, July 31, 1907

Ninety days after sight of the First of Exchange (second unpaid) please pay to the order of Anglo South American Bank Ltd twenty-five hundred pounds Sterling. Value received and charge the same to account.

TO MESSRS. KESSLER & CO.,

KESSLER & CO.

LIMITED

Accepted 12th August

Manchester

1907 payable at Lloyds

2834

payable London

Bank Limited 71 Lombard St. London.

No. 202123

KESSLER & CO. LIMITED.

P. W. KESSLER

Director

Indorsed: The Anglo South American Bank Ltd. (formerly The Bank of Tarapaca and Argentine, Ltd). A. J. Symons, Manager, N. S. Sweet, Sub. Accountant.

E. B 698

P 12.

2835 On the thirteenth day of November, in the year of our Lord one thousand nine hundred and seven, at the request of The Anglo South American Bank, Limited, London—I, William Crawley, of the City of London, Notary Public, duly admitted and sworn exhibited the original Bill of Exchange before copies to a Porter in the Bankinghouse of Lloyds Bank, Limited, No. 71 Lombard Street, London, where the said Bill is accepted payable and demanded payment of its contents WHICH DEMAND was not complied with, but the said Porter thereunto answered "Refer to Acceptors."

WHEREUPON, I said Notary, at the request aforesaid, have protested and by these presents do

solemnly protest against the Drawers and Ac- 2836  
ceptors of the said Bill and all others concerned  
for Exchange, Re-Echange, and all Costs, Dam-  
ages, Interest and Charges already incurred and to  
be hereinafter incurred for want of payment of the  
said Bill.

THUS DONE and protested in London aforesaid  
in the presence of Percy Watson Walker and Fran-  
cis F. McArdle, Witnesses.

In testimonium Veritatis,

WM. CRAWLEY,

Not. Pub.

2837

**Kessler & Co., Ltd., Ex. CC, Dec. 31/07,  
J. O. N.**

Exchange for

KESSLER & Co.

£2500

NEW YORK, July 31, 1907

Ninety days after sight of the First of Exchange  
(second unpaid) please pay to the order of Anglo  
South American Bank, Ltd, twenty-five hundred  
pounds Sterling Value received and charge the  
same to account

KESSLER & Co.

To MESSRS. KESSLER & Co.,

LIMITED

Accepted 12th August 2838

Manchester

1907 payable at Lloyds

payable London

Bank Limited 71 Lomb-

No. 202124

bard St. London.

KESSLER & Co. LIMITED,

P. W. KESSLER

Director

Indorsed: The Anglo South American Bank, Ltd.  
(formerly The Bank of Tarapaca and Argentina  
Ltd). A. J. Symons, Manager, N. S. Swee, Sub.  
Accountant.

On the thirteenth day of November, in the year  
of our Lord one thousand nine hundred and seven,



2839 at the request of The Anglo South American Bank, Limited, London—I, William Crawley, of the City of London, Notary Public, duly admitted and sworn exhibited the original Bill of Exchange before copies to a Porter in the Bankinghouse of Lloyds Bank, Limited, No. 71 Lombard Street, London, where the said Bill is accepted payable and demanded payment of its contents WHICH DEMAND was not complied with, but the said Porter thereunto answered "Refer to Acceptors."

2840 WHEREUPON, I the said Notary, at the request aforesaid, have protested and by these presents do solemnly protest against the Drawers and Acceptors of the said Bill and all others concerned for Exchange, Re-Echange, and all Costs, Damages, Interest and Charges already incurred and to be hereinafter incurred for want of payment of the said Bill.

THUS DONE and protested in London aforesaid in the presence of Percy Watson Walker and Francis F. McArdle, Witnesses.

In testimonium Veritatis,

WM. CRAWLEY,

Not. Pub.

2841

**Kessler & Co., Ltd., Ex. DD, Dec. 31/07, 3842**  
**J. O. N.**

Copy.

Exchange for £5000 Kessler & Company.

New York, October 15, 1907.

Advice as per Steamer Teutonic.

Ninety days after sight this first of exchange  
(second unpaid) please pay to the order of Colonial  
Bank five thousand pounds sterling, value received,  
and charged the same to account.

**KESSLER & COMPANY.**

To Messrs. KESSLER & COMPANY,

2843

LIMITED, Manchester.

Payable London.

No. 203,265.

On the face appears the following:

"Accepted, 25th of October, 1907. Payable at  
Lloyds Bank, Limited, 71 Lombard St.

**KESSLER & CO., LIMITED,**

**J. W. KESSLER,**

Director."

It is indorsed:

"The Colonial Bank is admitted a creditor for  
five thousand pounds in respect to this acceptance.

December 16, 1907.

2844

**KESSLER & CO., LTD.,**

**FRANK YOUATT,**

Liquidator."

It also carries a cancelled English revenue  
stamp for £2/10.

955

2845

**Kessler & Co., Ltd., Ex. FF, Feb. 1/08,  
J. O. N.**

Copy

Exchange for £2500. KESSLER &amp; CO.

NEW YORK, Sept. 16, 1907.

Ninety days after sight of this First of Exchange  
(second unpaid) please pay to the order of Uhl-  
felder, Thompson & Co. Twenty five hundred  
Pounds Sterling Value received and charge the  
same to account KESSLER & CO.

To Messrs. Kessler &amp; Co, Limited

2846

Manchester,

No. 202836

Payable London

(299)

Accepted 24th Sept 1907 payable at Lloyd's  
Bank Limited 71 Lombard St London, Kessler & Co  
Limited T W Kessler Director.

Advised per Str Kronprincessin Cecilie. £2500

Endorsed. Pay the Anglo Foreign Banking Co,  
Limited or order Value in account New York Sep  
16 1907 Uhlfelder, Thompson & Co D G G Levich  
Partner \* \* \* \* The Anglo Foreign Banking  
Co Ltd. are admitted creditors for £2500.0.0 in re-  
spect of this acceptance December 6th 1907 Kessler  
& Co Limd in Liquidation Frank Youatt Liquidator  
Per Pro the Anglo Foreign Banking Co Limited Geo  
B Jarvis per Manager.

2847

Exchange for £2500. Kessler &amp; Co

2848

NEW YORK, Sept 16 1907

Ninety days after sight of this First of Exchange  
(second unpaid) please pay to the order of Uhl-  
felder Thompson & Co Twenty five hundred Pounds  
Sterling Value received and charge the same to  
account

KESSLER &amp; CO.

To Messrs. Kessler &amp; Co, Limited

Manchester,

No. 202837 Payable London

(300)

Accepted 24th Septr 1907 payable at Lloyd's  
Bank Limited 71 Lombard St London Kessler & Co. 2849  
Limited, T. W. Kessler, Director.

(Endorsed) Pay the Anglo Foreign Banking Co  
Limited or order Value in account New York Sep  
16 1907 Uhlfelder Thompson & Co. D G G Levich  
Partner \* \* \* \* The Anglo Foreign Banking  
Co Ltd. are admitted creditors for £2500 in respect  
of this acceptance December 6 1907 Kessler & Co  
Lim. in liquidation Frank Youatt Liquidator Per  
Pro The Anglo Foreign Banking Co Limited Geo B  
Jarvis per Manager.

2850

Advised per Str. Kronprincessin Cecilie. £2500.

2851 Exchange for £2500 Kessler & Co

NEW YORK Sept 16 1907

Ninety days after sight of this First of Exchange  
(second unpaid) please pay to the order of Uhl-  
felder Thompson & Co Twenty five hundred Pounds  
Sterling Value received and charge the same to  
account KESSLER & Co

To Messrs Kessler & Co Limited  
Manchester  
No. 202838 Payable London

Accepted 24th Septr 1907 payable at Lloyd's  
Bank Limited 71 Lombard St London, Kessler &  
2852 Co Limited T. W. Kessler Director.

(Endorsed) Pay the Anglo Foreign Banking Co  
Limited or order Value in account New York Sept  
16 1907 Uhlfelder Thompson & Co D G G Levich  
Partner. \* \* \* The Anglo Foreign Banking  
Co Ltd are admitted creditors for £2500—in respect  
of this acceptance December 6th 1907 Kessler & Co  
Lim in Liquidation Frank Youatt Liquidator Per  
Pro The Anglo Foreign Banking Co Limited Geo B  
Jarvis Per Manager.

2853

Copy

2854

Exchange for £2500. Kessler &amp; Co.

NEW YORK, Sept. 16, 1907.

Ninety days after sight of this First of Exchange (second unpaid) please pay to the order of Uhlfelder, Thompson & Co. Twenty five hundred Pounds Sterling Value received and charge the same to account

KESSLER &amp; Co.

To Messrs. Kessler & Co Limited  
Manchester,  
No. 202839 Payable London  
(302)

Accepted 24th Septr 1907 payable at Lloyds Bank Limited 71 Lombard St London Kessler & Co Limited T W Kessler, Director.

Endorsed. Pay the Anglo Foreign Banking Co, Limited or order Value in account New York Sep 16 1907 Uhlfelder, Thompson & Co D G G Levich Partner. \* \* \* The Anglo Foreign Banking Co Ltd. are admitted creditors for £2500.0.0 in respect of this acceptance December 6th 1907 Kessler & Co Limd in Liquidation Frank Youatt Liquidator Per Pro the Anglo Foreign Banking Co Limited Geo B Jarvis per Manager.

2856

£2500  
Cecillie.  
Kronprinzessin  
Ztr  
Advised per

2857 Exchange for £2500. Kessler & Co.

NEW YORK Sept 16 1907

£2500  
Ninety days after sight of this First of Exchange  
(second unpaid) please pay to the order of Uhl-  
felder Thompson & Co Twenty five hundred  
Pounds Sterling Value received and charge the same  
to account KESSLER & Co.

To Messrs. Kessler & Co, Limited  
Manchester,  
No. 202840 Payable London  
(303)

2858 Accepted 24th Septr 1907 payable at Lloyd's  
Bank Limited 71 Lombard St London Kessler & Co.  
Limited, T. W. Kessler, Director.

Advised per Str Kronprincessin Cecilie.  
(Endorsed) Pay the Anglo Foreign Banking Co  
Limited or order Value in account New York Sep 16  
1907 Uhlfelder Thompson & Co. D G G Levich  
Partner \* \* \* \* The Anglo Foreign Banking  
Co Ltd. are admitted creditors for £2500 in respect  
of this acceptance December 6 1907 Kessler & Co  
Lim. in liquidation Frank Youatt Liquidator Per  
Pro The Anglo Foreign Banking Co Limited Geo  
B Jarvis per Manager.

2859

Exchange for £2500

Kessler &amp; Co

2860

NEW YORK Sept 16 1907

Ninety days after sight of this First of Exchange  
(second unpaid) please pay to the order of Uhl-  
felder Thompson & Co Twenty five hundred Pounds  
Sterling Value received and charge the same to  
account Kessler & Co

To Messrs Kessler & Co Limited  
Manchester

No. 202841 Payable London (304)

Accepted 24th Sept 1907 payable at Lloyd's  
Bank Limited 71 Lombard St London, Kessler &  
Co Limited, T. W. Kessler, Director.

2861

(Endorsed) Pay the Anglo Foreign Banking  
Co Limited or order Value in account New York  
Sept 16 1907 Uhlfelder Thompson & Co D G G  
Levich Partner \* \* \* \* The Anglo Foreign  
Banking Co Ltd are admitted creditors for £2500—  
in respect of this acceptance December 6th 1907  
Kessler & Co Lim in Liquidation Frank Youatt  
Liquidator Per Pro The Anglo Foreign Banking  
Co Limited George B Jarvis per Manager.

2862



2863 **Kessler & Co., Ltd., Ex. FF, Feb. 1/08,  
J. O. N.**

(One Shilling Stamp)

I, George Frederick Warren of the City of London Notary Public by Royal Authority duly admitted and sworn DO HEREBY CERTIFY to whom it may concern that the paper writings hereunto annexed contain true and faithful copies of the six original Bills of Exchange whereof they purport to be copies I having compared the said annexed copies with the said original Bills of Exchange and found the same to agree therewith in every respect.

2864 Whereof an Act being required I have granted these Presents under my Notarial Firm and Seal to serve and avail when and where need may require.

London, the first day of January  
in the Year of our Lord One thousand  
nine hundred and eight.

(Notary Seal)

(S'd) G. F. WARREN.  
Notary Public.

2865 **Kessler & Co., Ltd., Ex. GG, Feb. 1/08,  
J. O. N.**

CONSULATE-GENERAL OF THE UNITED STATES OF  
AMERICA FOR GREAT BRITAIN & IRELAND  
AT LONDON.

I, Robert J Wynne Consul General of the United States of America at London, England do hereby make known and certify to all whom it may concern

that George Frederick Warren, who hath signed the 2866  
annexed certificate, is a Notary Public, duly ad-  
mitted and sworn and practicing in the City of  
London, aforesaid, and that to all acts by him so  
done full faith and credit are and ought to be given  
in Judicature and thereout.

[SEAL] IN TESTIMONY WHEREOF I have hereunto  
set my hand and affixed my seal of Office  
at London aforesaid, this second day of  
January in the year of our Lord One  
Thousand Nine Hundred and Eight.

ROBERT J WYNNE,

Consul General.

2867

(\$2 American Consular Service Fee Stamp, Can-  
celled).

(Six one shilling stamps)

ON THE twenty-seventh day of December One  
thousand nine hundred and seven at the request  
of the Anglo Foreign Banking Company Limited  
London bearers of the six bills of exchange copied  
on the other side hereof, I George Frederick War-  
ren of the City of London Notary Public by Royal  
Authority duly admitted and sworn went to Lloyds  
Bank Limited No. 71 Lombard Street in this City 2868  
where the said six bills of exchange are made pay-  
able by the acceptance and speaking to a clerk I  
exhibited unto him the said six bills of exchange  
and demanded payment thereof whereunto he an-  
swered "No orders".

Therefore I the said Notary at the request afore-  
said have protested and by these presents do sol-  
emnly protest as well against the drawers and ac-  
ceptors of the said six bills of exchange as against  
all others whom it may concern for exchange re-ex-  
change and all costs charges damages and interest

2869 suffered and to be suffered for want of payment of  
the said six bills of exchange.

Protest £3.15—

Provg Consular  
legality  
& paid fee

}  
—14—

£4/9—

THUS DONE and pro-  
tested in London  
in the presence of  
George Franklin and  
Walter Joseph Nor-  
wood, witnesses.

G. F. WARREN,

[SEAL]

Notary Public.

2870

2871

**Kessler & Co., Ltd., Ex. HH, Feb. 1/08, 2872**  
**J. O. N.**

26 DEC

Exchange for £5000. KESSLER &amp; Co JM&amp;Co No 2885

NEW YORK SEPT 16 1907

5000      Ninety days after sight of this First  
of Exchange (second unpaid) please  
Advised      pay to the order of John Munroe & Co  
Per Str      Five thousand Pounds Sterling Value  
Kronprin- received and charge the same to ac-  
zessin      account

Cecilie.

KESSLER &amp; Co

To Messrs. KESSLER &amp; Co

2873

Limited

Manchester

K &amp; CO Ltd      97

Payable London.

No 202828      25      12

Stamp      Accepted 24th Sept 1907 Payable at

£2.10—      Lloyds Bank Limited 71 Lombard

Foreign Bill      St London.

15/6      GWF 27 Dec 1907

15/6      Duplicate protest

13/10      Procuring consular

legality &amp; paid fee.

KESSLER &amp; Co Limited

2874

(signed) T. W. KESSLER Director

Endorsed: Pay to Messrs Alexanders & Co Limited  
or order

Per Pro John Munroe &amp; Co

(Signed) W. A. Burnham

For Alexanders &amp; Co Limited

(Signed) W. P. Alexander Director.

2875 Exchange for £5000. KESSLER & Co 26 DEC

JM&CO No. 2884.

NEW YORK SEPT 16 1907.

5000      Ninety days after sight of this First  
of Exchange (second unpaid) please  
Advised      pay to the order of John Munroe & Co  
Per Str      Five thousand Pounds Sterling Value  
Kronprin- received and charge the same to ac-  
zessin      count  
Cecilie.      (Signed) KESSLER & Co

To Messrs. KESSLER & Co  
Limited

2876

Manchester

Payable London.

No. 202829

25      12

15/6      GFW 27 Dec 1907

15/6      Dupli protest

Stamp

13/10      Procuring

£.10—

Consular legality

Foreign Bill

& paid fee.

Accepted 24th Sept 1907 Payable at

Lloyds Bank Limited 71 Lombard st London

KESSLER & Co Limited

(Signed) T. W. KESSLER Director.

2877 Endorsed: Pay to Messrs Alexanders & Co Limited  
or order

Per Pro John Munroe & Co

(Signed) W. A. Burnham

For Alexanders & Co Limited

(Signed) W. P. Alexander Director.

(One Shilling Stamp)

2878

I, GEORGE FREDERICK WARREN of the City of London Notary Public by Royal Authority duly admitted and sworn Do Hereby Certify to whom it may concern that the paper writings hereunto annexed contain true and faithful copies of the two original Bills of Exchange whereof they purport to be copies I have compared the said annexed copied with the said Original Bills of Exchange and found the same to agree in every respect

Whereof an Act being required I have granted these Presents under my Notarial Firm and Seal to serve and avail when and where need may require.

2879

[NOTARY SEAL] London the first day of January in the year of our Lord One thousand nine hundred and eight.

S'd G. F. WARREN  
Notary Public.

2880

2881 **Kessler & Co., Ltd., Ex. JJ, Feb. 1/08,  
J. O. N.**

CONSULATE-GENERAL OF THE UNITED STATES OF  
AMERICA FOR GREAT BRITAIN & IRELAND AT  
LONDON.

I, ROBERT J. WYNNE, Consul General of the  
United States of America at London, England, do  
hereby make known and certify to all whom it may  
concern that George Frederick Warren hath  
signed the annexed Certificate, is a Notary Public,  
duly admitted and sworn and practising in the city  
2882 of London, aforesaid, and that to all acts by him  
so done full faith and credit are and ought to be  
given in Judicature and thereout.

In Testimony Whereof, I have hereunto set my  
hand and affixed my seal of Office at London afore-  
said, this Second day of January in the year of our  
Lord One Thousand Nine Hundred and eight.

(S'd) ROBERT J. WYNNE.

[CONSULATE SEAL.]

Consul-General.

[\$2 Fee Stamp.]

Similar certificate for other draft of Exhibit III.

DUPLICATE.

2883 (One Shilling Stamp.)

On the twenty seventh day of December One  
thousand nine hundred and seven at the request  
of Alexanders & Company Limited of London Ban-  
kers bearers of the bill of exchange copied on the  
other side hereof I George Frederick Warren of the  
City of London Notary Public by Royal authority  
duly admitted and sworn went to Lloyds Bank Lim-  
ited No. 71 Lombard Street in this City where the  
said bill of exchange is made payable by the accept-  
ance and speaking to a clerk I exhibited unto him  
the said bill of exchange and demanded payment  
thereof whereunto he answered "No orders." There-

fore I the said Notary at the request aforesaid have<sup>2884</sup>  
 protested and by these presents do solemnly pro-  
 test as well against the Drawers and Acceptors of  
 the said bill of exchange as against all others whom  
 it may concern for exchange re-exchange and all  
 costs charges damages and interest suffered and to  
 be suffered for want of payment of the said bill  
 of exchange.

Protest . . . . .	15- 6	DONE and protested	
Duplicate Protest . .	15- 6	in London in the	
Procg Consular . . .	13-10	presence of George	
		Franklin and Walter	
	£2- 4-10	Joseph Norwood Wit-	<sup>2885</sup>
legality & paid fee.		nesses.	

[NOTARY SEAL.]

(S'd) G. F. WARREN  
 Notary Public.

Similar certificate of protest for other draft of  
 Exhibit HH.

CONSULATE-GENERAL OF THE UNITED STATES OF  
 AMERICA FOR GREAT BRITAIN & IRELAND AT  
 LONDON.

I, ROBERT J. WYNNE, Consul-General of the  
 United States of America at London, England, do<sup>2886</sup>  
 hereby make known and certify to all whom it  
 may concern that George Frederick Warren who  
 hath signed the annexed Certificate, is a Notary  
 Public, duly admitted and sworn and practising in  
 the city of London, aforesaid, and that to all acts  
 by him so done full faith and credit are and ought  
 to be given in Judicature and thereout.

In Testimony Whereof I have hereunto sent my  
 hand and affixed my seal of Office at London afore-



2887 said, this Second day of January in the year of  
our Lord One Thousand Nine Hundred and eight.  
(U. S. Consulate Seal.)

[U. S. CONSULATE SEAL.]

(S'd) ROBERT J. WYNNE,  
Consul-General.

(\$2 Fee Stamp.)

Duplicate.

(One Shilling Stamp)

On the twenty seventh day of December One  
thousand nine hundred and seven at the request of  
Alexanders & Company Limited of London  
2888 Bankers bearers of the bill of exchange  
copied on the other side hereof, I, George  
Frederick Warren of the City of London  
Notary Public by Royal authority duly ad-  
mitted and sworn went to Lloyds Bank Limited No.  
71 Lombard Street in this City where the said  
bill of exchange is made payable by the acceptance  
and speaking to a clerk I exhibited to him the  
said bill of exchange and demanded payment  
thereof whereunto he answered "No orders."  
Therefore I, the said Notary, at the request afore-  
said have protested and by these presents do  
solemnly protest as well against the Drawers and  
2889 Acceptors of the said bill of exchange as against  
all others whom it may concern for exchange re-  
exchange and all costs charges damages and inter-  
est suffered and to be suffered for want of pay-  
ment of the said bill of exchange.

Protest ..... 15- 6 DONE and protested in  
Duplicate Protest 15- 6 London in the presence  
Procg Consular. .13-10 of George Franklin and

———— Walter Joseph Nor-  
wood Witnesses.

legality & paid fee.

(S'd) G. F. WARREN

[NOTARY SEAL]

Notary Public.

**Kessler & Co., Ltd., Ex. KK, Feb. 1/08, 2890**  
**J. O. N.**

CONSULATE-GENERAL OF THE UNITED STATES OF  
 AMERICA FOR GREAT BRITAIN & IRELAND  
 AT LONDON.

I, Richard Westacott, Vice and Deputy Consul General of the United States of America at London, England do hereby make known and certify to all whom it may concern that John Edward Newton who hath signed the annexed Certificate is a Notary Public duly admitted and sworn and practising in the City of London, aforesaid, and that to all acts by him so done full faith and credit are and ought to be given in Judicature and thereout. 2891

In Testimony Whereof, I have hereunto set my hand and affixed my seal of Office at London aforesaid, this nineteenth day of December in the year of our Lord One Thousand Nine Hundred and seven.

(S'd) RICHARD WESTACOTT

(\$2 fee Stamp) Vice and Deputy Consul General.

(One Shilling Stamp)

2892

United Kingdom of Great Britain and }  
 Ireland England. City of London. } ss.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC, by Royal authority duly admitted and sworn, practising in London, DO HEREBY CERTIFY unto all whom it shall or may concern that the Paper writings hereunto annexed, marked respectively with the letters "A", "B", "C" and "D" are faithful and accurate copies of four certain Original Bills of Exchange, which were to me Notary this day pro-

2893 duced, and wherewith the said annexed copies  
respectively agree word for word and in every particular.

[NOTARY SEAL] WHEREOF AN ACT being required, I the said Notary have granted these Presents under my Notarial Firm and Seal of Office to serve and avail as occasion shall or may require. DONE AND PASSED in LONDON this eighteenth day of December One thousand nine hundred and seven.

2894 In testimonium veritatis  
(S'd) JOHN E. NEWTON  
Notary Public London.

2895

"A"

2896

(One Shilling Stamp)

Exchange for £5000. Kessler &amp; Co. Jan. 3

Foreign  
bill

NEW YORK, Sept 24 1907.

stamp  
£2.Ninety days after sight of this First of Exchange  
(second unpaid) please pay to the order of W. L. S.Foreign  
bill stampJackson & Co Five thousand pounds Sterling  
Value received and charge the same to account

10/-

[Credit Industrial & Commercial London Agency  
1930]

Advised

per Str.

To Messrs KESSLER &amp; Co

310

Oceanic.

LIMITED.

KESSLER &amp; Co.

K. &amp; Co. Ltd.

289

305 No. 202965 Manchester. Payable London.  
Accepted 2nd October 1907 Payable at  
Lloyds Bank, Limited 71 Lombard St London.

KESSLER &amp; Co LIMITED

T. W. KESSLER Director.

Endorsed

Pay to the order of Union Discount Co of Lon-  
don Ltd W. L. S. Jackson & Co \* \* \* \* J.  
C. P., For the Union Discount Company of Lon-  
don Limited, J. C. Peace, H. R. Hallward pro Man-  
ager. The Union Discount Company of London  
Ltd is admitted a creditor for £5000 in respect of  
this acceptance December 6th 1907. Kessler & Co  
Lim in liquidation Frank Youatt Liquidator.

289

2899

"B"

(One Shilling Stamp)

Foreign	Exchange for £5000.	
bill	Kessler & Co.	Jan. 3
stamp £2	NEW YORK, Sept. 24, 1907.	
Foreign	Ninety days after sight of this first	
bill	of Exchange (second unpaid) please	
stamp 16/.	pay to the order of W. L. S. Jackson	
Advised	& Co Five thousand pounds Sterling	
per Str.	Value received and charge the same	
Oceanic.	to account	A 3949
		310

2900 To Messrs Kessler & Co  
Limited.

Kessler &amp; Co.

[K&Co. Ltd No. 202966. Manchester.  
306 Payable London.

Accepted 2nd October 1907 Pay-  
able at Lloyds Bank Limited 71  
Lombard St London

KESSLER &amp; CO LIMITED

T. W. Kessler, Director.

Endorsed—Pay to the order of Union Discount Co  
of London Ltd W. L. S. Jackson & Co. \* \*  
\* J. C. P. For the Union Discount Company  
of London Limited J. C. Peace H. R. Hall-  
ward pro Manager. The Union Discount Com-  
pany of London Ltd is admitted a Creditor for  
£5000 in respect of this acceptance December  
6th, 1907 Kessler & Co Lim in liquidation  
Frank Youatt Liquidator.

2901

(One Shilling Stamp)

Foreign Exchange for £5000.  
 bill Kessler & Co. 3rd Jan.  
 stamp £2 NEW YORK, Sept 24 1907.  
 Foreign Ninety days after sight of this first  
 bill of Exchange (second unpaid) please  
 stamp 10/. pay to the order of W. L. S. Jackson  
 Advised & Co Five thousand pounds Sterling  
 per Str. Value received and charge the same  
 Oceanic. to account

310

To Messrs Kessler & Co  
 Limited.

2908

Kessler &amp; Co.

[K&Co. Ltd No. 202967. Manchester.  
 307 Payable London.

Accepted 2nd October 1907 Pay-  
 able at Lloyds Bank Limited 71  
 Lombard St London.

KESSLER &amp; CO LIMITED

T. W. Kessler Director.

Endorsed—Pay to the order of Union Discount Co  
 of London Ltd W. L. S. Jackson & Co. For  
 the Union Discount Company of London  
 Limited J. C. Peace H. R. Hallward pro Man- 2904  
 ager. The Union Discount Company of Lon-  
 don Ltd is admitted a Creditor for £5000 in  
 respect of this acceptance December 6th 1907  
 Kessler & Co Lim in liquidation Frank Youatt  
 Liquidator. In need with Union Discount  
 Company of London Limited.

2905

"D"

(One Shilling Stamp)

Foreign	Exchange for £5000.	
bill	Kessler & Co.	Jan. 3
stamp £2		NEW YORK, Sept 24 1907.
Foreign	Ninety days after sight of this first	
bill	of Exchange (second unpaid) please	
stamp 10/.	pay to the order of W. L. S. Jackson	
Advised	& Co Five thousand pounds Sterling	
per Str.	Value received and charge the same	
Oceanic.	to account	A 3948

310

2906 To Messrs Kessler & Co  
Limited.

Kessler &amp; Co.

[K&Co. Ltd No. 202968  
308

Manchester.

Payable London.

Accepted 2nd October 1907 Pay-  
able at Lloyds Bank Limited 71  
Lombard St London

KESSLER &amp; CO LIMITED.

T. W. Kessler Director.

Endorsed—Pay to the order of Union Discount Co  
of London Ltd W. L. S. Jackson & Co. \* \*

2907 \* J. C. P. For the Union Discount Company  
of London Limited J. C. Peace H. R. Hall-  
ward pro Manager. The Union Discount Com-  
pany of London Ltd is admitted a Creditor for  
£5000 in respect of this acceptance December  
6th, 1907 Kessler & Co Lim in liquidation  
Frank Youatt Liquidator.

**Kessler & Co., Ltd., Exhibit LL, Feb. 1, 2908**  
**08, J. O. N.**

(Copy)

Exchange for £5000

Kessler & Co Jan. 6 No. 2884

NEW YORK Sept. 16 1907

Advice per Str	Ninety days after sight of this	
Kronprinzessen	First of Exchange (second un-	
Cecile	paid) please pay to the order of	
	John Monroe & Co Five thousand	
5000	pounds Sterling Value received	
	and charge same to account.	2909

KESSLER & Co

To Messrs Kessler & Co. Limited  
 No. 202829

Manchester Payable London.  
 Accepted 24th Sept 1907 Payable  
 at Lloyds Bank Limited 71 Lombard St London Kessler & Co  
 Limited T. W. Kessler Director  
 (Endorsed) Pay to Messrs Alexanders & Co Limited or order  
 Per Pro John Monroe & Co. W.  
 A. Burnham For Alexanders &  
 Co Ltd W. P. Alexander Director.

2910



2911

(Copy)

Exchange for £5000

Kessler &amp; Co Jan. 6 No. 2885

NEW YORK Sept. 16 1907

Advice per Str      Ninety days after sight of this  
 Kronprinzessen      First of Exchange (second un-  
 Cecile                  paid) please pay to the order of  
                                 John Monroe & Co Five thousand  
                                 pounds Sterling Value received  
                                 and charge same to account

5000

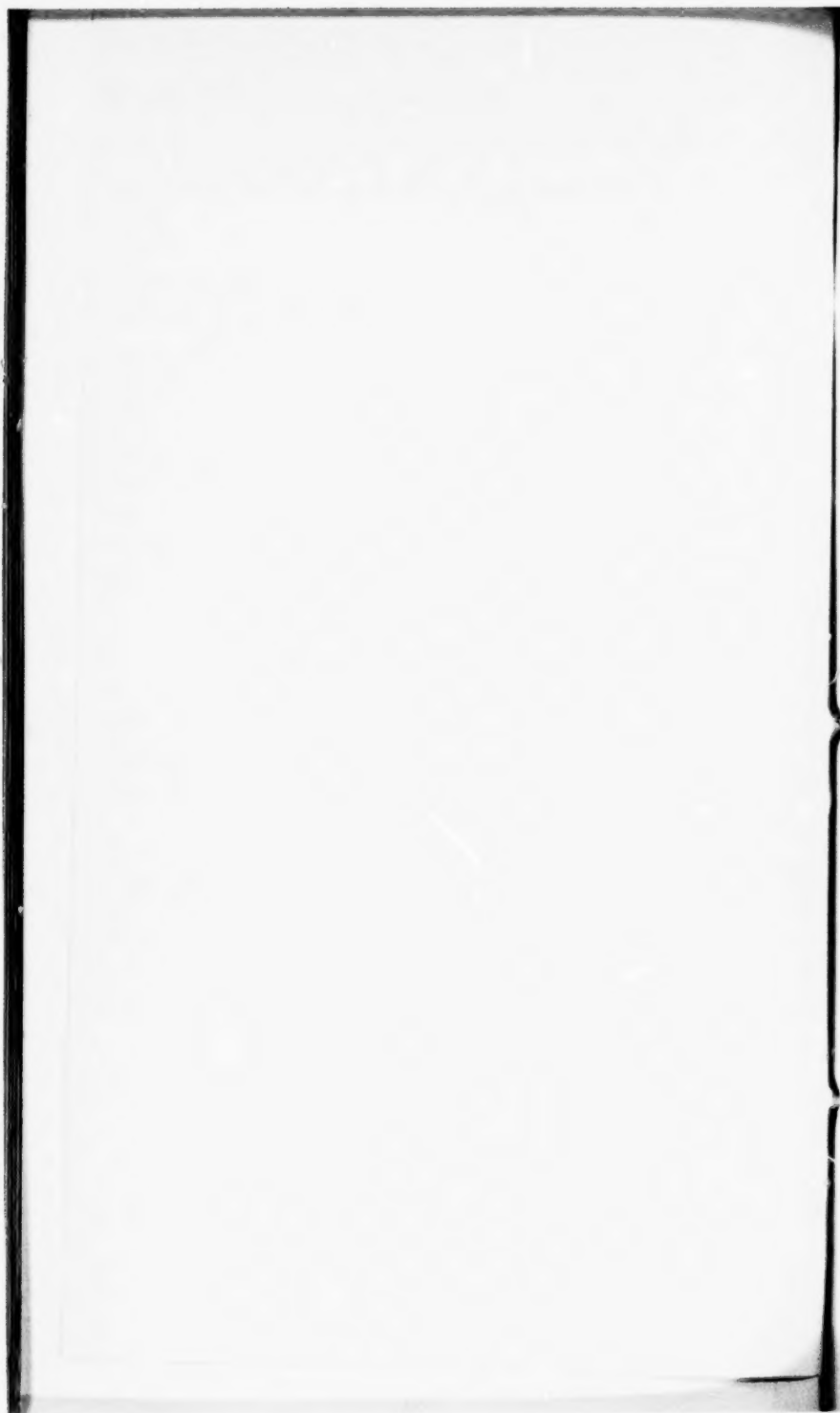
KESSLER &amp; Co

To Messrs. Kessler &amp; Co. Limited

2912 No. 202828

Manchester Payable London.  
 Accepted 24th Sept 1907 Payable  
 at Lloyds Bank Limited 71 Lombard St London Kessler & Co Limited T. W. Kessler Director (Endorsed) Pay to Messrs Alexanders & Co Limited or order Per Pro John Monroe & Co. W. A. Burnham For Alexanders & Co Ltd W. P. Alexander Director.

2913



**Kessler & Co., Ltd., Exhibit OO, Feb. 2917**  
**11/08, J. O. N.**

17 Feb. 3.

Private.

MESSRS. KESSLER & Co.,  
 New York:

DEAR SIRs—We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30th of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced. <sup>2918</sup>

We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for and we remain, dear Sirs,

Yrs very truly,

P. W. KESSLER. 2919

**Kessler & Co., Ltd., Ex. QQ, Feb 17 08,**  
**J. O. N.**

ITEM I.

\$25,000.00 par value ORLEANS COUNTY QUARRY COMPANY. First Mortgage Coupon, 6% Gold Bonds, numbered 25, 24, 23, 22, 21, 20, 69, 68, 67, 66, 65, 64, 63, 62, 61, 60, 59, 58, 57, 56, 55, 54, 53, 52, 51, payable to bearer, not registered. Coupon No.

2920 4, April, 1908, attached, with coupons subsequent.  
Par value \$1,000 each.

The Bond recites that the Orleans County Quarry Company is a New York Corporation. Trustee, The Trust Company of America.

#### ITEM II.

Note signed Milne, Turnbull & Company, dated July 11, 1907, payable four months after date, \$16,000.00, to the order of Kessler & Company, at office of Kessler & Co., 54 Wall Street, New York. Endorsed in blank "Kessler & Company."

2921

#### ITEM III.

Note signed Milne, Turnbull & Company, dated August 27, 1907, payable four months after date, \$7,000.00, to the order of Kessler & Company, at office of Kessler & Company, 54 Wall Street, New York, endorsed in blank "Kessler & Company."

#### ITEM IV.

Note signed Milne, Turnbull & Company, dated August 27, 1907, payable four months after date, 2922 \$17,000.00, to the order of Kessler & Company, at office of Kessler & Company, 54 Wall Street, New York, endorsed in blank, "Kessler & Company."

#### ITEM V.

Note signed R. B. Maclea Company, R. K. Maclea, Treasurer, dated August 5, 1907, four months, \$5,000.00, to the order of Kessler & Company, at office of Kessler & Company, 54 Wall Street, New York, endorsed in blank, "Kessler & Company."

## ITEMS VI AND VII.

## CRIPPLE CREEK CENTRAL RAILWAY COMPANY STOCK.

Certificates for PREFERRED STOCK, The Cripple Creek Central Railway Company, as follows:

No. 180,—100 shares preferred Stock, in name of George Meyer, dated May 29, 1906, endorsed in blank as follows: "Kessler & Company," "in presence of Albert Katt," endorsement dated June 1st, 1906, said endorsement being in blank, under usual printed power of transfer on stock Certificates.

No. 177, ditto.

No. 178, ditto.

No. 179, ditto.

Certificate numbered A-1015, 60 shares, dated August 20, 1906, name of Albert Katt, endorsed in blank, "Albert Katt, Kessler & Company," "in presence of Albert Heyne," date of endorsement being August 1, 1906. 2924

Certificate numbered A-946, 6 shares Preferred Stock, in name of Albert Katt, dated May 18, 1906, endorsed in blank May, 18, 1906, "Albert Katt, Kessler & Company," "In presence of Albert Heyne."

Certificates for COMMON STOCK, The Cripple Creek Central Railway Company, as follows:

No. B-172, 100 shares, May 29, 1906, in name of George Meyer, endorsed June 1, 1906, "George Meyer, Kessler & Company, in the presence of Albert Katt." 2925

No. B-173, ditto, same name, date and endorsement.

No. B-174, ditto, same name, date and endorsement.

## GENERAL ESCROW.

## ITEM L.

The following certificates of UNITED LIGHTING & HEATING COMPANY, a New Jersey Corporation.

No. 203, 10 shares Common, name of Albert Heyne, dated June 7, 1899, endorsed in blank with-

2926 out date, "Albert Heyne," "sealed and delivered in the presence of William E. Magie."

No. 204, 490 shares, name of James W. Escher, June 7, 1899, endorsed in blank without date, "James W. Escher," "sealed and delivered in presence of William E. Magie."

No. 205—310 shares Common, same name, same date and endorsement as 204.

No. 207—200 shares Common, name of Rudolf E. F. Flinsch, June 7, 1899, endorsed in blank without date, "Rudolf E. F. Flinsch," "sealed and delivered in presence of William E. Magie."

2928 208—200 shares Common, June 7, 1899, Alfred Kessler, endorsed in blank without date, "Alfred Kessler," "sealed and delivered in presence of William E. Magie."

No. 209.—50 shares Common, dated June 7, 1899, name of Philip Ahrens, endorsed in blank without date, "Philip Ahrens, sealed and delivered in presence of William E. Magie."

No. 213.—333 shares common, dated June 7, 1899, name of Otto G. Nestle, endorsed in blank without date, "Otto G. Nestle, sealed and delivered in presence of William E. Magie."

No. 214.—333 shares Common, same as 213 as to name and endorsement and date.

2928 No. 215.—23 shares Common, same as Nos. 213 and 214 as to name endorsement and date.

No. 287.—100 shares Common dated November 22, 1901, name of Philip Ahrens, endorsed in blank "Philip Ahrens, November 26, 1901, sealed and delivered in presence of William E. Magie."

No. 288.—100 shares Common, same as to name, date and endorsement as 287.

No. 289.—100 shares Common, same as to name, date and endorsement as 288.

No. 290.—100 shares Common, same as to name, date and endorsement as 289.

No. 292.—15 shares Common, name of Philip

Ahrens, dated November 22, 1901, endorsed in 2929  
blank, "Philip Ahrens, November 26, 1901, sealed  
and delivered in presence of William E. Magie."

No. 293.—64 shares Common, name of Philip  
Ahrens, dated November 22, 1901, endorsed in  
blank, "Philip Ahrens, November 26, 1901, sealed  
and delivered in presence of William E. Magie."

## ITEM II.

DAIMLER MANUFACTURING COMPANY, New York  
Corporation, par value shares \$100.00:

Certificate A-4, 100 shares Preferred stock, dat-  
ed December 2, 1901, name of Otto G. Nestle, Sec- 2930  
retary, endorsed in blank without date, "Otto G.  
Nestle, Secretary, Witness, Theodore Lurman."

(Note.—The officers signing this certificate are  
Otto G. Nestle, Secretary; A. R. Allen, President.)

Certificate A-5.—100 shares preferred, same  
name, date and endorsement as A-4.

Certificate A-6.—100 shares Preferred, same  
name, date and endorsement as A-5.

Certificate A-7.—100 shares Preferred, same  
name, date and endorsement as A-6.

A-8.—100 shares Preferred, same name, date  
and endorsement as A-7.

A-9.—100 shares preferred, same name, date 2931  
and endorsement as A-8.

A-10.—100 shares Preferred, same name, date  
and endorsement as A-9.

A-11.—100 shares Preferred, same name, date  
and endorsement as A-10.

A-12.—100 shares Preferred, same name, date  
and endorsement at A-11.

A-20.—100 shares preferred, dated December  
18, 1901, name of Otto G. Nestle, Secretary, en-  
dorsed in blank without date, "Otto G. Nestle,  
Secretary, Witness, W. E. Magie."

2932 A21.—100 shares Preferred, same name, date and endorsement as A-20.

A 22.—100 shares Preferred, same name, date and endorsement as A-21.

A 23.—60 shares Preferred, same name, date and endorsement as A-22.

A-13.—81 shares Preferred, dated December 2, 1901, name of Otto G. Nestle, Secretary, endorsed in blank without date, "Otto G. Nestle, Secretary, Witness, Theodore Lurman."

### ITEM III.

The following Bonds UNITED BREWERIES COMPANY First Mortgage Bond, par value \$1,000.00, 6%. Interest payable February and August 1st; Bonds payable to bearer or in case of registry to the registered owner.

February, 1908, coupon No. 19, for \$30.00 attached and subsequent coupons.

No. 2070 *not* registered payable to bearer.

No. 2051 *not* registered payable to bearer.

No. 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 1676, 472, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 2995, 2996, 2997, 2998, 2999, 2934 3000, 3001, 3002, 819, 820, 821, 822, 823, 824, 825, 2661, 2662, 2663.

None of the above are registered.

### ITEM IV.

FOUR NOTES, UNITED BREWERIES COMPANY, as follows:

A. Note \$15,000.00 dated September 17, 1903, signed, "The United Breweries Company by I. Baugart, Chairman of the Board of Directors, countersigned, H. C. Bannard, President," payable September 17, 1911, to own order. Endorsed as fol-



lows in blank, "United Breweries Company, I. 2935 Baumgart, Chairman of the Board of Directors, countersigned H. C. Bannard, President." Interest 6% per annum.

On the face of the said note appear various stampings in red ink relative to the payment of interest, the last of which is "interest paid September 17, 1907, the New York Trust Company, H. W. Morse, Assistant Secretary."

B. Similar note, same date, signatures and endorsement in blank, \$10,000.00 to own order, payable September 17, 1912, interest 6% per annum. Same stamping as to payment of interest.

C. Similar note, same date, signatures and endorsement in blank, \$5,000.00 to own order, due September 17, 1913, 6% interest. Same stamping as to payment of interest. 2936

D. Note, United Breweries Company, dated September 17, 1903, signed "The United Breweries Company by I. Baumgart, Chairman of the Board of Directors," countersigned "W. O. Tegtmeier, Vice-President," "\$20,000.00, payable September 17, 1914, to own order, interest 6%, endorsed in blank, "United Breweries Company, I. Baumgart, Chairman of the Board of Directors, countersigned W. O. Tegtmeier, Vice-President." Stamp- 2937 ing on face with payments of interest, the last being, "Interest paid to September 17, 1907, New York Trust Company, H. W. Morse, Assistant Secretary."

#### ITEMS V. AND VI.

ITEM V. Certificate No. 9168, THE UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, ENGLAND, LIMITED, 1,000 shares of £10 each, reading in the body thereof as follows:

"This is to certify that Messrs. Kessler & Company of 54 Wall Street, New York, Bankers, is the

- 2938 registered holder of 1,000 shares of £10 each, numbered 293, 131 to 294, 130, inclusive, in the above named Company subjected to the memorandum and articles thereof and that the sum of £2 has been paid upon each of the said shares, together with such further sums as are mentioned on the back hereof. Given under the name and seal of the said Company the 18th day of August, 1902." Upon the back thereof appear certificates of the payment of £8. Attached thereto is an irrevocable power of attorney Brewers' Legal Blank No. 114 to the effect that Kessler & Company have sold and transferred to.....the said 1,000 shares. Dated February 14, 1907, signed 'Kessler & Company,' presence of W. E. Magie."
- 2139

- ITEM VI. Trust Certificate No. B-311, 2,000 shares per value £1 each, Underground Electric Railways Company of London, Limited, issued by the Central Trust Company of New York as Trustee; certifying that Kessler & Company is entitled to 2,000 shares of the par value of £1 Sterling each in a certain Trust Fund provided for in an agreement dated September 8, 1902, between the Metropolitan District Electric Traction Company, Limited, the Underground Electric Railway Company of London, Limited, and the said Central Trust Company of New York, said certificate being dated New York, January 2, 1903, signed by the Central Trust Company, endorsed in blank under the printed power on the back, "Kessler & Company, February 6, 1903, in the presence of William E. Magie." Attached thereto are two notices of call, numbered 395 and 595, by the Underground Electric Railways Company of London, Limited, call No. 395, being dated January 22nd, 1907, calling £25 on the 1,000 shares of the said Company held by Kessler & Company, and a receipt for said £2500 dated the 14th day of February, 1907, signed
- 2940

by Speyer & Company for the Underground Elec- 2941  
tric Railways Company; call No. 495, dated July  
20, 1906, for £2500 with similar certificate of two  
payments of £1250 each.

(These two notices of call should be attached to  
the certificate for 1,000 shares (Certificate 0168)  
as the calls correspond to the notations of pay-  
ment on the back of said Certificate.)

#### ITEMS VII & VIII.

ITEM VII. STANDARD ROLLER BEARING COM-  
PANY, Common stock:

Certificate 196, for 20 shares Common, dated 2942  
February 1, 1904, in the name of Horace W. Ful-  
ler, to which is attached (on Brewers' blank ir-  
revocable power No. 114) an assignment and power  
to transfer the same, with the name of the trans-  
feree blank, signed "Horace W. Fuller," and  
"Signed, sealed and delivered in the presence of  
H. Bacon, dated March 10, 1904."

Certificate No. 145, 50 shares Common, dated  
July 20, 1903, in name of Horace W. Fuller, to  
which is attached similar irrevocable power, as-  
signment and transfer, name of transferee blank,  
signed by Horace W. Fuller and sealed, dated the 2943  
10th day of March, 1904, "signed, sealed and de-  
livered in the presence of H. Bacon."

ITEM VIII. Certificate No. A-116,—100 shares  
Standard Roller Bearing Company, Preferred  
Stock, dated June 30, 1903, in name of Horace W.  
Fuller, to which is attached similar irrevocable  
power, assignment and transfer, signed by Horace  
W. Fuller, sealed, dated the 16th day of September,  
1903, "Signed, sealed and delivered in the presence  
of H. Bacon."

2944

## ITEM IX.

## ELKTON MINING COMPANY:

10 Certificates numbered from 30595 to 30604, inclusive, each for 1000 shares of the Elkton Consolidated Mining and Milling Company, in the name of Kessler & Company, dated October 29, 1907, each endorsed in blank under printed power of assignment in usual form, "Kessler & Company," dated October 29, 1907, "Witness, H. Bacon."

## ITEM X.

## UNITED STATES REDUCTION AND REFINING COMPANY. Common Stock:

2945 Certificates numbered as follows, each for 100 shares:

B-34, dated 10th day of July, 1901, name of Rudolf E. F. Flinsch, endorsed in blank under usual form of Stock Transfer on back "R. E. F. Flinsch," and also "Kessler & Company," "In presence of William E. Magie," Endorsement dated September 5, 1901.

B-35, same date, name and endorsement and same date of endorsement.

B-74, dated July 10th, 1901, name of W. K. Gillett, endorsed in blank, dated March 19, 1902, "W. K. Gillett," "Kessler & Company," "In presence of  
2946 H. Bacon."

B-1310,—dated April 27, 1905, in name of Lounsbury & Company, endorsed in blank, under date of April 28, 1905, under usual printed form, "Lounsbury & Company, in presence of William H. Ten Broeck."

B-1309,—dated April 27, 1905, in name of Lounsbury & Company, endorsed April 28, 1905, "Lounsbury & Company, in presence of William H. Ten Broeck, endorsed in blank under usual printer form.

B-1308,—April 27, 1905, name of Lounsbury & Company, endorsed April 28, 1905, "Lounsbury &

Company, in presence of William H. Ten Broeck," 2947  
endorsed in blank under usual printed form.

B-1307,—same date, name, endorsement in blank  
and same date of endorsement as 1308.

B-1306,—Same date, name, endorsement in blank  
and same date of endorsement as 1307

B-96. July 10, 1901, name of Alfred Kessler,  
endorsed in blank, under usual printed form, dated  
July 25, 1901, "Alfred Kessler," "In presence of  
W. E. Magie."

B-97,—July 10, 1901, name of Alfred Kessler,  
endorsed in blank under usual printed form, dated  
July 25, 1901, "Alfred Kessler," and Also "Kessler  
& Company," "In presence of W. E. Magie." 2948

#### ITEM XI.

UNITED STATES REDUCTION AND REFINING COM-  
PANY, Preferred Stock:

Five Certificates numbered 1324 to 1328, inclu-  
sive, each for 100 shares, each dated the 19th day  
of September, 1905, each in the name of Albert  
Katt, each endorsed in blank under usual printed  
form of stock transfer as follows: "Albert Katt",  
"Kessler & Company," "In presence of P. A.  
Brueck." Endorsement dated on each certificate,  
September 20 1905.

2949

#### ITEM XII.

BONDS OF THE PITTSBURG, WESTMORELAND & SOM-  
ERSET RAILROAD COMPANY."

First Mortgage 5%, 30 year Gold Bonds, due Oc-  
tober, 1935, interest due April and October 1st.  
Trustee, New York Trust Company, par value  
\$1000.00 each. Coupons attached from April 1908  
on, to wit:—from Coupon No. 5 to No. 60, inclusive.  
Each bond a Bearer Bond, viz: "To the New York  
Trust Company of New York or bearer," and no  
one of said Bonds being registered. Numbers of

2950 said Bonds being as follows: Nos. 201 to 228, inclusive. Nos. 417 to 433, inclusive.

(Note,—Under the elastic band holding said bonds together appears a slip of paper containing the following: "45,000 Pitts. West & Somerset K. & Co., Escrow.")

#### ITEM XIII.

THE FOLLOWING BONDS OF THE INDIANA, COLUMBUS & EASTERN TRACTION COMPANY.

Par value, \$1000.00 General & Refunding Mortgage, 5% 20 year Gold Bonds, principal due 1926, interest payable May 1st and November 1st in Philadelphia. Each Bond payable to bearer or registered holder, none of said Bonds being registered. Attached to each Bond are coupons numbered 4 to 40, inclusive, number 4 being due May 1908, \$25. Name of Trustee The Pennsylvania Company for Insurance on Lives and Granting Annuities. Bonds numbered 1618 to 1629 inclusive.

#### ITEMS XIV & XV.

MUSKOGEE GAS AND ELECTRIC COMPANY, Oklahoma Corporation.

ITEM XIV. Common Stock, Certificate No. 19, 100 shares dated February 13, 1907, name of Kessler & Company, endorsed in blank under printed power of assignment, and transfer February 20, 1907, "Kessler & Company," "In presence of W. E. Magie."

Certificate No. 20,—100 shares ditto, Common, dated February 13, 1907, name of Kessler & Company, endorsed February 20, 1907, endorsed in blank under regular printed form, "Kessler & Company," "In presence of W. E. Magie."

Certificate No. 21,—88 shares ditto, common, dated February 13, 1907, name of "Kessler & Company", endorsed in blank under date of February

20, 1907, "Kessler & Company," "in presence of W. E. Magie." 2953

ITEM XV. Preferred Stock. Certificate No. 24,—100 shares preferred, dated February 13, 1907, name of Kessler & Company, endorsed in blank under printed form of transfer under date of February 20, 1907, "Kessler & Company, in presence of W. E. Magie."

Certificate No. 25,—ditto preferred, 100 shares dated February 13, 1907, name of Kessler & Company, endorsed in blank under printed form of transfer under date of February 20, 1907, "Kessler & Company, in presence of W. E. Magie."

Certificate No. 26,—88 shares ditto preferred 2954  
February 13, 1907, name of Kessler & Company, endorsed in blank under printed form of transfer February 20, 1907, "Kessler & Company, presence of W. E. Magie."

#### ITEM XVI.

##### MUSKOGEE GAS AND ELECTRIC COMPANY BONDS.

(Note,—These Bonds were found in a roll covered by a brown paper on which appeared the following: "Kessler & Company, Escrow Muskogee Gas and Electric Company bonds, 5%, June and December," and the figures "22" underneath this 2955  
"42" and underneath this "43" with lines drawn through the figures "42" and "43".)

These Bonds are the Muskogee Gas & Electric Company, \$1000.00 each, First and Refunding mortgage 5% Gold Bond, principal due December 1, 1926, interest payable June 1, and December 1, at the American Trust & Savings Bank, Chicago, Illinois. Trustee, American Trust & Savings Bank of Chicago, Illinois, each Bond is a bearer Bond or may be registered. None of the Bonds are registered. Said Bonds are numbered 149 to 170 inclusive, and attached to each bond are coupons num-

bered 2 to 40, inclusive, coupon No. 2 being due December 1st, 1907.

# ITEM XVII.

## DOCUMENTS IN RELATION TO BEDFORD AVENUE PROPERTY.

A. Bond and Mortgage, Catherine I. Mackay and husband to the Title Guarantee and Trust Company, principal sum \$10,000.00 payable June 16, 1893, interest at 5%, dated June 16, 1892, and acknowledged on that date. Mortgage accompanying same by same parties for \$10,000.00 same dates and acknowledgment covering property situate, lying and being in the City of Brooklyn, County of Kings and State of New York, bounded and described as follows: to wit:

BEGINNING at a point on the Westerly side of Bedford Avenue, distant Two Hundred and Thirty-seven feet Southerly from the corner formed by the intersection of the Westerly side of Bedford Avenue with the Southerly side of De Kalb Avenue; running thence Westerly One hundred feet to a point distant Two hundred and Thirty-seven feet, eight inches Southerly from the Southerly side of De Kalb Avenue when measured on a line drawn parallel with Bedford Avenue; thence Southerly parallel with Bedford Avenue Twenty-four feet, Three inches; thence Easterly parallel with De Kalb Avenue and part of the distance through a party wall One hundred feet to the Westerly side of Bedford Avenue and thence Northerly along the Westerly side of Bedford Avenue Twenty-four feet, Eleven inches to the point or place of beginning. Being a portion of the same premises which are conveyed to the said Catherine I. Mackey by Edward Freel and wife, by deed bearing even date herewith and intended to be recorded simultaneously with this Indenture; this mortgage being a purchase money mortgage and



given to secure a portion of the consideration in 2959 said deed expressed. The said Mortgage is recorded in the Registrar's Office, Kings County, Liber 211 Mortgages, page 231, June 18, 1892.

B. Assignment of said Mortgage and Bond, Title, No. 37196 by Title Guarantee and Trust Company to William G. Vermilye as Trustee under the last Will and Testament of Charles C. Lathrop, said Assignment being duly recorded in the Registrar's Office, Kings County, Liber 2417, Mortgages, page 423, July 13, 1892.

C. Extension of mortgage, dated December 11, 2960 1897, between William G. Vermilye as Trustee, etc., and Edward J. Halligan, extending said Mortgage to November 16, 1900.

D. Assignment of said Mortgage by William G. Vermilye as trustee under the last will and Testament of Charles C. Lathrop to Emma G. Lathrop, assigning a Mortgage dated June 10, 1892, made by Catherine I. Mackay and John, her husband, to the Title Guarantee and Trust Company, and recorded June 18, 1892, County of Kings, Liber 2411, Mortgages, page 431, and thereafter assigned to the party of the first part by assignment dated 2961 July 9, 1892, recorded Kings County, July 13, 1892, Liber 2417, Mortgages, page 423. Said Assignment was executed on the 8th day of May, 1899, and acknowledged on the 15th day of May, 1899, and is stamped, recorded Registrar's Office, Kings County, Liber 20, page 401, Mortgages, Section 7, Block 1942, May 15, 1899.

E. Deed, dated October 31, 1907, between Henry Kessler of Manchester, England, and Gertrude Sophia Kessler, his wife, and Kessler & Company, Limited, of Manchester, England, conveying pre-

2962 mises Nos. 1018, 1020 and 1022 Bedford Avenue, Brooklyn, bounded and described as follows:

BEGINNING at a point on the Westerly side of Bedford Avenue, distant Two hundred and Thirty-seven feet Southerly from the corner formed by the intersection of the Westerly side of Bedford Avenue with the Southerly side of De Kalb Avenue, running thence Westerly One hundred feet to a point distant Two hundred, Thirty-seven feet, Eight inches, Southerly from the Southerly side of De Kalb Avenue measured on a line drawn parallel with Bedford Avenue, thence Southerly parallel with Bedford Avenue Seventy-two feet, Nine inches, 2963 thence Easterly parallel with De Kalb Avenue and part of the distance through a party wall one hundred feet to the Westerly side of Bedford Avenue, and thence Northerly along the Westerly side of Bedford Avenue seventy-three feet, Five inches to the point or place of beginning; said Deed being a sale covering against Grantor Deed, signed by the parties grantor, 31st of October, 1907, and acknowledged on said date before Frederick C. McLaughlin, Notary Public.

F. Following receipt "New York, October 31, 1907, Received this day from Mr. Henry Kessler the following documents to have same recorded in office 2964 of Registrar of Kings County, and returned to him. First: Assignment of Mortgage dated February 19, 1903, from Emma G. Lathrop to Henry Kessler, covering premises No. 1020 Bedford Avenue, Brooklyn, amount \$10,150.00. Second, deed from William K. Gillett to Henry Kessler covering Nos. 1018 and 1020 Bedford Avenue, Brooklyn, dated November 13, 1905." Signed, McLaughlin, Russell, Coe & Sprague.

#### ITEM XVIII.

A RECEIPT For Subscription payments No. 57, WESTERN PACIFIC RAILWAY COMPANY, First

Mortgage 5% 30 year Gold Bonds. Syndicate sub- 2965  
 scription, \$40,000.00 in face value of Bonds, recit-  
 ing, Blair & Company, William Salomon & Com-  
 pany and William A. Reed & Company, Managers  
 of the above named Syndicate, hereby acknowledge  
 the receipt by them as such Managers of the sum of  
 Seven thousand, Two hundred, Thirty four and  
 28/100 (\$7,234.28) Dollars on account of obligation  
 of Kessler & Company as a subscriber to said  
 Syndicate, the same being the amount of the first  
 instalment payable by said subscriber under the  
 agreement of April 26, 1905. This receipt is issued  
 subject to all the terms and conditions of the  
 Syndicate agreement and the holder of this receipt 2966  
 by the acceptance hereof assents to and agrees to be  
 bound by all the provisions of said agreement.  
 Dated July 6, 1905, signed Blair & Company, for  
 the Managers. Stamped on the back; Interest paid  
 to September 1st, 1905.

Ditto, March 1st, 1906.

Ditto, September 1st, 1906.

Ditto, September 1st, 1907.

Ditto, March 1st, 1907.

Attached thereto is an irrevocable power No. 114,  
 Brewers Blank, a transferee of the same in blank,  
 the said assignment in blank signed "Kessler & Com- 2967  
 pany," sealed and dated 8th of July, 1907. "Signed,  
 sealed and delivered in the presence of W. E.  
 Magie."

#### ITEM XIX.

CHICAGO, GREAT WESTERN RAILWAY COMPANY.  
 The following certificates:

A—2435,—100 shares of \$100.00 each, of the 4%  
 Preferred Stock B of the said Company, dated June  
 14, 1906, name of Kessler & Company, endorsed in  
 blank under usual printed form of transfer on

2968 back, "June 21, 1906, Kessler & Company, in presence of W. E. Magie."

A—2436,—100 shares ditto, date and name same as A—2435, endorsed in blank under same date, in same manner "Kessler & Company."

A—2437,—100 shares ditto, same date, name and same endorsement in blank same date and manner as No. 2436.

A—2438,—100 shares ditto, same date, name and same endorsement in blank, under date of June 21, 1906, by Kessler & Company.

A—2439,—100 shares ditto, same date, name and same endorsement of Kessler & Company in blank, 2969 June 21, 1906.

No. 921, dated June 14, 1906, for 48 shares of \$100.00 each in the 4% Preferred Stock B of same Company, name of Kessler & Company, endorsed under usual form of transfer in blank, "Kessler & Company, June 21, 1906, in presence of William E. Magie."

#### ITEM XX.

##### Roll of Bonds, ORLEANS COUNTY QUARRY.

(Note.—Held together by elastic band, under which is inserted slip of paper as follows: "\$20,000 Orleans County, Kessler & Company, Escrow.")

Said bonds Orleans County Quarry being First 2970 Mortgage Coupons, 6% Gold Bonds, Bearer Bonds, with provisions for Registry. Par value \$1000.00, principal due April 1st, 1926, interest payable April 1st and October 1st, Trustee, Trust Company of America.

Said Bonds are numbered 26 to 45, inclusive, none of them are registered and each contains the coupons numbered 4 to 40, inclusive, for \$30.00 each; number 4 being payable April 1908.

## DISTRICT COURT OF THE UNITED STATES, 2971

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.  
FLINSCH and WILLIAM K.  
GILLETT, composing the firm  
of Kessler & Company,  
Bankrupts.

LAWRENCE E. SEXTON, as  
Receiver in Bankruptcy, of  
Alfred Kessler, Rudolf E. F.  
Flinsch and William K. Gil-  
lett, composing the firm of  
Kessler & Company, and the  
said Kessler & Company

AGAINST

KESSLER &amp; COMPANY, LIMITED.

2972

TO THE HONORABLE, THE JUDGES OF THE DISTRICT 2973  
COURT OF THE UNITED STATES IN AND FOR THE  
SOUTHERN DISTRICT OF NEW YORK:

I, PETER B. OLNEY, appointed by the District  
Court "Master in Chancery to take the testimony  
in this cause and report the same to this Court with  
his opinion," do hereby respectfully report as fol-  
lows:

On the motion of Kessler & Company, Limited, of  
Manchester, England, and Frank Youatt, Esq., the  
provisional liquidator of Kessler & Company, Lim-  
ited, an order was made in the bankruptcy proceed-

- 2974 ings on the 26th day of November, 1907, by Hon. Charles M. Hough, District Judge, that the "claim of the Receiver in Bankruptcy herein and of the estate of the bankrupts above named to the securities and property in the possession of Kessler & Company, Limited, of Manchester, England, which claim is set forth in the affidavit of John Larkin, Esquire, verified the 7th day of November, 1907, upon which the order appointing the Receiver herein was made, and any and all other claims of the said bankrupt estate to the said property, be and the same hereby are referred to Honorable Peter B. Olney, Referee in Bankruptcy, as United States Special Commissioner, to hear and determine the same upon the merits."
- 2975

Pursuant to said order, the respective parties appeared before the undersigned, and began to take evidence. Thereafter, by consent, in order to present the issues, Lawrence E. Sexton as Receiver in Bankruptcy of Kessler & Company filed his petition duly verified on the 10th day of December, 1907, wherein he prayed that the securities and property in question transferred by the bankrupts be held to be the property of the bankrupt estate, and that the same be delivered to him as Receiver or to the Trustee of the said estate when he had been elected, and to this petition Kessler & Company, Limited, and Frank Youatt, Esq., its liquidator, appearing by their attorneys, filed their answer duly verified on said 10th day of December, 1907, denying the material allegations in the petition contained.

2976

A vast amount of testimony and evidence was taken in the matter, which, contained in two volumes, is herewith filed.

On the 30th day of December, 1907, Lawrence E. Sexton, the Receiver, was duly elected Trustee of the bankrupts, and duly qualified as such Trustee

on the 7th of January, 1908, and is now in the dis- 2977  
charge of his duties as such.

On the 23rd day of March, 1908, an order was entered herein by the Hon. George C. Holt, District Judge, upon the motion of John Larkin, Esq., attorney for Lawrence E. Sexton, Trustee, and upon the consent of the attorneys of Kessler & Company, Limited, and Frank Youatt, Esq., its liquidator, which order recited that Kessler & Company, Limited, and its liquidator on or about the 23rd day of November, 1907, had waived its right to a plenary suit and submitted to the jurisdiction of this Court, and recited the other proceedings hereinbefore set forth, and ordered, "that this action be deemed an 2978  
action in equity brought by Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Company, bankrupts, both as individuals and as copartners of the firm of Kessler & Company, against Kessler & Company, Limited, and that the pleadings interposed herein by the parties be deemed the pleadings in said action, and that the said action be deemed in all respects an action in equity by the Trustee in Bankruptcy brought in the United States District Court for the Southern District of New York in pursuance of the provisions of the bankruptcy statutes, and be governed by all the rules of procedure and of law with reference thereto." And 2979  
said order further provided, "that the order of reference to Peter B. Olney, Esq., dated November 26th, 1907, be and the same hereby is amended by striking out the words 'Special Master to hear and determine the same upon the merits' and inserting in lieu thereof the following, 'Master in Chancery to take the testimony in this cause and to report the same to this Court with his opinion'; and the amendment hereby ordered to be made in said last mentioned order shall be deemed to have been made as of November 26, 1907." A copy of said order is herewith returned.

- 2980 On the 30th day of March, 1908, an order was made herein by Hon. George C. Holt, District Judge, upon the petition of J. & P. Coats, Limited, a corporation, for leave to intervene herein. After the filing of said petition and the affidavit of William M. Coleman in support thereof, and due proof of service of copy of said affidavit and petition and notice of application upon the attorneys for Kessler & Company, Limited, and Frank Youatt, its liquidator, and upon the attorney for the petitioning creditors herein, and after hearing counsel in support of the application and counsel for the Trustee in opposition, on motion of William D.
- 2981 Guthrie, Esq., attorney for said J. & P. Coats, Limited, the Court ordered that "J. & P. Coats, Limited, be and it hereby is granted leave to intervene herein and to file the intervening petition annexed to the moving papers herein setting forth its claim; that the allegations therein be taken to be denied by the Trustee, without the filing of any formal reply to any new matters alleged therein, and that the issues raised by such answer be and the same hereby are referred to Peter B. Olney, Esq., the Special Master heretofore appointed, to take proof and report with his opinion. And it is further ordered, that all the testimony and exhibits heretofore taken before the Special Commissioner stand,
- 2982 and that the intervention of these petitioners be subject thereto, and that further hearings before said Referee on said intervention, if any, proceed so far as practicable from day to day in order that the proceedings before said Referee be determined without any unnecessary delay. And it is further ordered, that in the event of the intervenor succeeding on this application, the costs be paid out of the bankrupt estate. And it is further ordered, that this order be amended *nunc pro tunc* as of March 3rd, 1908, the day said application to intervene was heard by the Court."



Thereafter, such evidence as was offered by J. & P. Coats, Limited, the intervening petitioner, was taken, and will be found in volume 2nd of the evidence herewith filed. The claim of J. & P. Coats, Limited, is in substance that they are entitled to be subrogated to whatever rights Kessler & Company, Limited, have in the securities called the escrow of August, 1907. 2983

Upon the hearings before me, Lawrence E. Sexton, the Receiver and Trustee, has been represented by John Larkin, his attorney and counsel; Kessler & Company, Limited, and Frank Youatt, its liquidator, by Messrs. McLaughlin, Russell, Coe & Sprague, their attorneys, and by Abram I. Elkus, Esq., of counsel; J. & P. Coats, Limited, by William F. Coleman, Esq., and by Henry D. Hotchkiss, Esq., of counsel, and Origen S. Seymour, Esq., attorney for the bankrupts Kessler and Flinsch, attended on some of the hearings; and I have been greatly aided in the consideration of the proofs and questions of law involved by the able and voluminous briefs filed by the respective counsel. 2984

After careful examination of the evidence taken, I report the following Findings of Fact:

FIRST.—That prior to its bankruptcy Kessler & Company of New York was a partnership organized on the 1st day of January, 1902, and composed of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, and carried on business as bankers and brokers, its principal office being at 54 Wall Street, in the City of New York. The firm of Kessler & Company and its predecessors had been in business in the City of New York for many years. The firm was engaged in the business of foreign bankers, having correspondents in various parts of Europe. It bought and sold foreign exchange in large amounts; it made loans, it bought and sold stocks and bonds on the Stock Exchange, the firm having a membership there; it advanced moneys to 2985

2986 several dry goods importing houses; it opened letters of credit for importation of goods; issued travelers' letters of credit; it promoted industrial and railroad enterprises, and it participated in various syndicates organized to promote such enterprises. Its dealings in foreign exchange were very large, involving the "turn-over" in the course of a year of many millions.

2987 SECOND.—Kessler & Company, Limited, of Manchester, England, was and is a corporation organized in 1902, under the English Companies Acts, with its principal office in the City of Manchester, England, and a branch office in New York. Its principal business is dealing in dry goods; it has agents in various parts of the world, and sends out travelers everywhere. In addition to its dry goods business, it did some business in accepting drafts, making payments against a few letters of credit, and accepting a few deposits. It did not discount notes. Its directors are: Philip W. Kessler, George A. Averdieck, George A. Kessler and Henry Kessler. Henry Kessler is Chairman of the Company and chief managing officer. Philip W. Kessler and George A. Kessler are sons of William Kessler, deceased, and brothers of Alfred Kessler, one of the bankrupts. Henry Kessler is a second cousin of Alfred Kessler. Said William Kessler during his life was a member of the firm of Kessler & Company of New York as well as of the firm of Kessler & Company of Manchester, which prior to his death was a copartnership. William Kessler died in January, 1901. Thereafter the corporation was organized in 1902. The authorized capital stock of the Manchester corporation is 250,000 pounds, equally divided between ordinary and preference shares. 108,501 pounds of ordinary shares have been issued, all of which are owned among the executors of William Kessler, deceased, and branches of the Kessler

2988

family and their connections or relations, except 2989 ordinary shares to the amount of 10,000 pounds, which are owned by George A. Averdieck. 112,000 pounds of preference shares have been issued, of which 54,300 pounds are owned by various members of the two branches of the Kessler family, some of whom are no relation to Alfred Kessler, and 57,700 pounds are owned by others than the Kessler family. Alfred Kessler owns three thousand pounds of ordinary and three thousand pounds of preference shares.

William Kessler's interest prior to his death in the firm of Kessler & Company, of New York, the predecessor of the present bankrupt firm, was 2990 thirty per cent. of profit and losses. On the death of William Kessler, his interest in Kessler & Company of New York was liquidated, and his share of the capital and profits paid to his executors, except the sum of about \$95,000, which was left in the firm as a loan, upon which his executors have received interest at five per cent. In addition to this \$95,000, a further sum of about \$78,000 was loaned by the executors of William Kessler to Alfred Kessler personally, and part of this sum was loaned by Alfred Kessler to Flinsch. This \$78,000 was used by Alfred Kessler and Flinsch to make up their proportionate contribution to the 2991 new partnership of Kessler & Company of New York, the present partnership, which began the 1st day of January, 1902, and consisted of the bankrupts. This partnership was organized with a capital of \$1,000,000, of which Flinsch contributed \$400,000, Alfred Kessler, \$300,000, and William K. Gillett, \$300,000.

THIRD.—The principal business relation between Kessler & Company, of New York, and Kessler & Company, Limited, of Manchester, was a constant drawing credit afforded by the Manchester corpo-

2992 ration to the New York partnership. Prior to June 30th, 1903, this constant credit seems to have been extended without security having been given or required.

FOURTH.—On or about June 30th, 1903, Kessler & Company, of New York, sent the following letter to Kessler & Company, Limited, Manchester, which was received by said company:

"KESSLER & Co., Bankers,  
No. 54 Wall Street,  
New York.

JUNE 30, 1903.

Per S. S. "Oceanic."

2993

Messrs. KESSLER & Co., Limited,  
Manchester.

DEAR SIRS:—

In accordance with instructions from Mr. Alfred Kessler, we have today placed in a separate package in our safe deposit vaults the following securities, package marked "Escrow for account of Kessler & Co., Limited, Manchester":

1484 shares Oklahoma Gas & Elec-	
tric Co., at 25 .....	\$37,100.
2428 shares United Lighting & Heat-	
ing Co., at 12 .....	29,136.
2994 2352 shares Daimler Manufacturing	
Company, at 50 .....	117,600.
\$373,000. United Breweries Co.	
first 6's, at 65 .....	242,245.
	<hr/>
	\$406,081.

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige.

Yours very truly,

KESSLER & Co."

On the 8th day of July, 1903, the following letter <sup>2995</sup> from Kessler & Company, Manchester, to Kessler & Company, of New York, was written, sent and received in due course of mail:

"8th July 3.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

We are in receipt of your favour of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter <sup>2996</sup> goes in order.

If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality.

\* \* \*

We are, dear Sirs,

Yours very truly,  
P. W. KESSLER."

The following letter dated the 23rd of December, 1903, was sent by the Manchester Company to <sup>2997</sup> Messrs. Kessler & Company, New York, and received by said firm:

*"Private*

23rd Dec. 3.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

For the purposes of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities

2998

you have set aside against your drawing credit with us. We should like this done annually on the 31st December.

We do not think the matter will present any difficulty for you. Something in the form of the enclosed is what we require.

Thanking you in advance,

We are, dear Sirs,

Yrs truly,

P. W. KESSLER.

2999

We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, .03, as security for the drawing credit which you accord us, the following securities.

Name secs. and market value."

To this letter Kessler & Company, of New York, replied as follows:—

"KESSLER & Co.

Bankers.

54 Wall Street,

New York, 1 Jan., 1904.

Messrs. KESSLER & Co., Lim.,

Manchester.

3000

DEAR SIRs,

We certify that we have specially set aside and hold for your account on this, the 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities:

1484 shares Oklahoma Gas & Electric, at .....	25	\$37,100
2428 shares United Light and Heating, at .....	10	24,280
2352 shares Daimler Mfg. Co, at 50		117,600
\$36,000 shares United Brewery New		
1st 6% bonds, at .....	100	36,000

"50,000 shares United Brewery New	3001
1st 6% notes at .....100	50,000

"134,800 Certificates of pay- ments to Trust. Co. on a. c. 1st Mortgage bonds of Chicago & Gt. Western R. R., at .....	}	
		89 119,972

1348 shares Com. Stock C. Gt. W.	
	15 20,220

---

\$405,172

You hold in addition to this	
1606 shares United Lighting & Heating .....	10 16,060 3002

---

\$421,232

KESSLER & Co."

On or about the 20th of January, 1904, Kessler & Company, Limited, sent the following letter to Kessler & Company, New York:

*"Private*

20 Jany.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs,

3003

We are in receipt of your favour of 1st Jany, in which you give us particulars of the securities you hold in escrow for us against your drawing credit with us. The same are noted.

Should you, in the course of the year, through sale or otherwise, have occasion to vary this deposit, we should feel obliged by your advising us forthwith.

We are, dear Sirs,

Yours very truly,

P. W. KESSLER,"

- 3004 FIFTH.—The securities mentioned in the letter of Kessler & Company, of New York, of the date of June 30th, 1903, were put in a separate package and put on a shelf in one of the safe deposit vaults of Kessler & Company. This package was endorsed, "Escrow of Kessler & Co., of Manchester," with list of the securities, with the valuation placed on them, following the endorsement. The changes in the securities, that is, the taking out of certain of the securities and substituting others in their place—was done in the safe deposit company. The package containing the securities was not removed from the safe deposit vault except on two occasions; once, 3005 when Mr. P. W. Kessler was in New York, when the securities were taken over to the office and he checked them off, and on a similar occasion when Frank Youatt was over here, and for his examination the securities were produced and checked off; on the 24th of October, 1907, the examination of the securities by Henry Kessler seems to have been made in the safe deposit vault.

- SIXTH.—Changes in these securities were frequent, and were made by Kessler & Company, of New York, without consulting Kessler & Company, of Manchester, beforehand, but the changes were reported after they had been made. In no case does 2006 it appear that Kessler & Company, of Manchester, objected to any of the changes made.

SEVENTH.—Kessler & Company, of New York, in a memorandum book, which was called the loan book, made certain entries relative to these transactions. The first entry is entitled, "Escrow Kessler & Co., Manchester," and appears to have been made under date of April 15th, 1904. Under this entry were entries of the securities then constituting the escrow and memoranda indicating changes which were made subsequent to that time down to



and including October 13th, 1904. At the date of <sup>3007</sup> October 14th, 1904, under the head "Kessler & Co., Manchester Escrow," the securities at that time constituting the escrow were entered on a subsequent page in the loan book, and changes made down to and including November 2nd, 1904, were noted. On January 4th, 1905, under the head "Escrow Kessler & Co. Manchester," the securities at that time constituting the escrow were entered on a subsequent page in the loan book, and the changes thereafter indicated down to and including July 3rd, 1905. On July 15th, 1905, similar entries were made, and thereafter from time to time, on subsequent pages of the loan book. The last entry of that <sup>3008</sup> character is on page 159 of the loan book, under date of October 22nd, 1907.

This entry is as follows:

"Escrow Kessler & Co. Ltd.			
Manchester.			
2428 sh. United Lighting &			
Heat .....	10	\$24,280.	
1606 sh. United Lighting &			
Heat in Manchester.....	10	16,060.	
1341 sh. Daimler Mfg Co.			
pf'd. ....	100	134,100.	
\$56,000 United Breweries 1st			
M. 6's.....	80	44,800.	3009
50,000 United Breweries			
Notes .....		50,000.	
1,000 sh. Underground El. }			
Ldn. full paid..... }			
200 sh. Underground Bene- }		49,663.13	
ficial Cert..... }			
70 sh. Standard Roller Bear-			
ing \$50. share.....	60	4,200.	
100 sh. Standard Roller pf'd..	50	5,000.	
10,000 sh. Elkton Mining Co.	50	5,000.	
500 Sh. U. S. Red. & Ref. Co.			
Pfd. ....	25	12,500.	

3010	1,000 U. S. Red. & Ref. Co. com. ....	10	10,000.
	\$45,000. Pittsburg., Westmore- land & Som. 1st 5's. ....	95	42,750.
	12,000—Ind. Col. & East Tract 1st. ....	90	10,800.
	288 Sh. Muskogee, Gas & Elect. Com. ....	20	5,760.
	288 Sh. Muskogee, pfd. ....	60	17,280.
	\$22,000 Muskogee, pfd. Refdg. ....	87	19,140.
	Bedford Avenue property...		31,000.
	Western Pacific Syn. rect...		7,234.28
3011	548 sh. Chicago Gt. Westn. Pfdg. B. ....	10	5,480.
	\$20,000 Orleans County Quarry Co. 1st. ....	90	18,000.
<hr/>			
			\$513,047.41

The entries in red ink on that page, which entries include everything except the value of the shares, which values are in black ink, and the footing, which is in pencil, are in the handwriting of Albert Kessler, then a confidential clerk in the employ of Kessler & Company of New York. The valuations of the securities, which are in black ink, are in the handwriting of the bankrupt Alfred Kessler, as is also the footing in pencil, to wit, \$513,047.41.

EIGHTH.—Under date of New York, 27th of August, 1907, the following letter was written by Kessler & Company of New York to Kessler & Company, Manchester, and received by the latter Company:

"Kessler & Co.,            54 Wall Street,  
Bankers.                    NEW YORK, 27 Aug. 1907  
MESSRS. KESSLER & Co. Lim.  
Manchester.

Dear Sirs,

A few days ago we sold at 90 1/2 and Int.  
\$20,000 Muskogee Gas & El. Bonds and with-

drew them from your escrow replacing them 3013  
by \$20,000 Orleans County Quarry bonds 1st  
6%’s at 90.

“We cabled you to-day we had drawn  
£20,000 60 d.s on your good selves and gave  
placed in a separate escrow against this the  
following:

\$25,000 Orleans Co. Quarry 1st 6s at 90.....	\$22,500	
Note \$10,000 Orleans Co Quarry se- cured by bonds at 75 Nov. 7.....	10,000	
Note \$10,000 Orleans Co Quarry se- cured by bonds at 75 Nov. 7....	10,000	
Note \$4,775 Orleans Co Quarry se- cured by bonds at 75 Nov. 18....	4,775	3014
Note \$8,000 R. B. Maclea Co. Due Dec. 5.....	8,000	
Note \$7,000 R. B. Maclea Co. Due Dec. 5.....	7,000	
Note \$5,000 R. B. Maclea Co. Due Dec. 5.....	5,000	
Note \$16,000 Milne Turnbull & Co. Nov. 11	16,000	
Note \$17,000 “ Dec. 27	17,000	
Note \$7,000 “ “	7,000	
	<hr/> 107,275	3015

Yours truly,  
KESSLER & Co.”

In answer to that letter, Kessler & Company of  
Manchester under date of the 4th of September,  
1907, wrote as follows:

*“Private*

4th Sept. 7.

Messrs. KESSLER & Co.

New York.

DEAR SIRS:

We note from your favour of the 27th ulto.  
the change you have made in our escrow,

3016

We also take note of the securities which you have lodged in a new separate escrow against your special drawing of £20,000 about which you cabled us and which you advise in your ordinary correspondence received today.

We anticipate that this special drawing will not be renewed and that your drafts on us generally will presently come to a more moderate level.

Yours very truly,

P. W. KESSLER."

3017

This escrow was called the "Special Escrow" and the securities were put in a separate package and placed on a shelf in the vault of Kessler & Company of New York and endorsed: "Special Escrow, Kessler & Co. of Manchester." Nothing appears to have been said by Kessler & Company of Manchester about Kessler & Company of New York having permission or authority to withdraw any of these securities in the special escrow and substitute other securities therefor. Kessler & Company of New York, however, did withdraw certain of these securities and substituted others in their place. On the 20th of September, 1907, Kessler & Company

3018

of New York withdrew two Orleans County Quarry notes, each for \$10,000, and bonds as collateral, and put in place thereof 200 shares of common Cripple Creek Central Railroad stock and 200 shares of preferred Cripple Creek Central Railroad stock. On the 27th of September, 1907, they withdrew from the special escrow \$8,000 note of R. B. Maclea Company and \$7,000 note of R. B. Maclea Company, and put in their place 166 shares of preferred Cripple Creek Central Railroad stock and 100 shares of common Cripple Creek Central Railroad stock. On the 10th of October, 1907, Kessler & Company of New York withdrew the Orleans

County Quarry note of \$4,775 and the bonds at- 3019  
tached, and substituted in place thereof 100 shares  
of preferred Cripple Creek Central Railroad stock.

With respect to this special escrow an entry was  
made on page 154 of the loan book as follows: "Spe-  
cial Escrow, Kessler & Co., August 27 (1907),  
£20,000, 60 d.s."; then follows a description of the  
securities originally constituting the special escrow  
and the changes, as above indicated, made from time  
to time down to and including October 10th, 1907.

NINTH.—On October 4th, 1907, Henry Kessler,  
who was the Chairman and chief managing officer  
of Kessler & Company, Limited, arrived in New 3020  
York. On the following day Henry Kessler called  
at the office of Kessler & Company in Wall Street  
and there met Mr. McLean, Mr. Albert Kessler and  
Mr. Nestle, employees of Kessler & Company. On  
the 7th of October, 1907, he was at the office of Kess-  
ler & Company and saw Alfred Kessler, Albert  
Kessler, Nestle and McLean. He went to Philadel-  
phia on the 8th and stayed there until the 14th,  
thence he went to Atlantic City, and returned to  
New York on the 21st of October. Certain communi-  
cations received from the Manchester Company were  
forwarded by Kessler & Company of New York to  
Mr. Henry Kessler, and received by him, during his 3021  
absence from the city. On the 21st of October Alfred  
Kessler and his wife dined with Henry Kessler at  
the latter's hotel.

On Tuesday, October 22nd, 1907, Henry Kessler  
visited the office of Kessler & Company in Wall  
Street. On that day the Knickerbocker Trust Com-  
pany closed its doors, and the acute financial panic  
began and continued during the rest of that week  
and the following week and for some time there-  
after. Henry Kessler remained in New York dur-  
ing the week ending Saturday, the 26th of October,  
with the exception of a visit to Philadelphia on the

3022 23rd. On the 24th and 25th of October he visited the office of Kessler & Company. On the 23rd of October the run was begun upon the Trust Company of America, whose office is at No. 37 Wall Street, which run persisted for many days, and for several days Wall Street was crowded with depositors seeking to draw their deposits. There was great excitement in the Stock Exchange. Rates for money were quoted at 115, and unlisted securities and securities other than first class securities could not be sold at any price.

On the 24th of October, 1907, Henry Kessler, together with Albert Kessler, examined the securities  
 3023 in the "escrow" and special "escrow," and checked off same. On the afternoon of the 24th of October Henry Kessler called at the office of Messrs. McLaughlin, Russell, Coe & Sprague, and there had a conversation with Mr. McLaughlin. In the course of conversation about other matters, the matter of the "escrow" was mentioned, and Mr. McLaughlin advised Henry Kessler to take possession of the "escrow" securities in the name of Kessler & Company, Limited, of Manchester, and to place them in a separate safe deposit box. At that interview Mr. Henry Kessler stated to Mr. McLaughlin, in reply to a question, that Kessler & Company of New York were solvent.

3024 About ten o'clock on the 25th day of October, 1907, Henry Kessler went to the office of Kessler & Company and told Alfred Kessler that he was going to take charge of the securities. Alfred Kessler said: "All right. They are yours. Do what you like." Thereupon, Henry Kessler went with Albert Kessler to the North American Safe Deposit Company, took from the vaults of Kessler & Company, of New York, the separate packages of securities comprising the general and special "escrows" (with the exception of the 1,606 shares of United Lighting and Heating Co. stock and the

10,000 shares of Elkton Mining Co. stock), checked 3025 them off, found them correct as indicated by the list, hired a new safe deposit box in the name of Kessler & Company, Ltd., of Manchester, and placed the securities in the box so hired, giving right of access thereto to North McLean, Albert Kessler and Mr. Nestle, employees of Kessler & Company, of New York.

TENTIL.—After taking possession of said securities, Henry Kessler executed and delivered on behalf of Kessler & Company, Limited, an instrument in words and figures following, to wit:

"KNOW ALL MEN BY THESE PRESENTS that, 3026  
Whereas Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, individually and as copartners, composing the firm of Kessler & Company, Bankers and Brokers of No. 54 Wall street, Manhattan, New York City, are justly and truly indebted to Kessler & Company, Limited, of Manchester, England, in the sum of Five hundred thousand Dollars (\$500,000.00) and upwards, and

WHEREAS the said firm of Kessler & Company of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company, Limited, of Manchester, England, 3027  
certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company, Limited, in the safe deposit valuts in the North American Safe Deposit Company, in the City of New York, Now in order that the securities composing such collateral may be from time to time exchanged or replaced by the said Kessler & Company, of New York, without in any way impairing the total value of

3028

the securities so deposited as collateral to the said indebtedness, the said Kessler & Company, Limited, of Manchester, England, does hereby made, constitute and appoint as its agents for it and in its behalf, to act for the purposes hereinafter specified, the following gentlemen:—North McLean, Albert Kessler, Otto G. Nestle, and the said Kessler & Company, Limited, of Manchester, England, does hereby authorize and empower the said North McLean, Albert Kessler and Otto G. Nestle, and all or each of them, from time to time as may be requested by Kessler & Company, of New York, to allow the said Kessler & Company to re-place the securities so pledged as collateral to the indebtedness of Kessler & Company, of New York, to Kessler & Company, Limited, of Manchester, England, by other securities, providing that the total value of the said collaterals is not thereby lessened, except in proportion as the indebtedness is from time to time reduced, or as the same may vary from time to time.

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IN WITNESS WHEREOF the said Kessler & Company, Limited, of Manchester, England, has caused these presents to be signed in its corporate name by Henry Kessler, Chairman of the Board of Directors and of the Company, this 25th day of October, 1907.

KESSLER & Co., LIMITED

H. KESSLER, Director.

Sworn and subscribed to before me }  
this 26th day of Oct. 1907. }

PHILIP F. W. AHRENS,

Notary Public.

[NOTARY'S SEAL]



We, the undersigned North McLean, Al- 3031  
bert Kessler, Otto G. Nestle, do hereby ac-  
cept the trust and agency conferred upon us  
by Kessler & Company, Limited, of Man-  
chester, England, and agree to act faith-  
fully as agents of the said Kessler & Com-  
pany, Limited, in the premises.

IN WITNESS WHEREOF, we have hereunto  
subscribed our names this 25th day of Oc-  
tober, 1907.

NORTH MCLEAN,  
ALB. KESSLER,  
OTTO G. NESTLE."

2032

(Then follows acknowledgment by North Mc-  
Lean, Albert Kessler and Otto G. Nestle on the  
26th of October, 1907).

On the 30th of October, 1907, Henry Kessler exe-  
cuted and delivered on behalf of Kessler & Com-  
pany, Limited, an instrument in words and figures  
following, to wit:

"KNOW ALL MEN BY THESE PRESENTS that  
WHEREAS ALFRED KESSLER, RUDOLF E. F.  
FLINSCH and WILLIAM K. GILLETT, individ-  
ually and as co-partners, composing the firm  
of Kessler & Company, Bankers and Brok- 3033  
ers, of No. 54 Wall Street, Manhattan, New  
York City, are justly and truly indebted to  
Kessler & Company, Limited, of Manchester,  
England, in the sum of Four hundred thou-  
sand Dollars (\$400,000.00) and upwards,  
and

WHEREAS the said firm of Kessler & Com-  
pany of No. 54 Wall Street, Manhattan, New  
York City, have deposited with Kessler &  
Company, Limited, of Manchester, England,

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certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company, Limited, in the safe deposit vaults in the North American Safe Deposit Company in the City of New York, and are now in the possession of and under the sole control of Kessler & Company, Limited. Now in order that the securities comprising such collateral may be from time to time exchanged or re-placed without in any way impairing the total value of the securities so deposited as collateral to the said indebtedness, the said Kessler &

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Company, Limited, of Manchester, England, does hereby make, constitute and appoint as its agents for it and in its behalf, for the purposes hereinafter specified, the following gentlemen: Albert Kessler and Otto G. Nestle and the said Kessler & Company, Limited, of Manchester, England, does hereby authorize and empower the said Albert Kessler and Otto G. Nestle and each of them, from time to time as may be requested by Kessler & Company, Limited, of Manchester, England, to allow any person, corporation or copartnership to replace the securities so pledged as collateral to the indebtedness of Kessler & Company, of New

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York, to Kessler & Company, Limited, of Manchester, England, by other securities, providing that the total value of the said collaterals is not thereby lessened, except in proportion as the indebtedness is from time to time reduced, or as the same may vary from time to time.

IN WITNESS WHEREOF the said Kessler & Company, Limited, of Manchester, England, has caused these presents to be signed in its

corporate name by Henry Kessler, Chair- 3037  
man, of the Board of Directors and of the  
Company, this 30th day of October, 1907.

KESSLER & Co., LIMITED,  
H. KESSLER, Director.  
[SEAL]

Sworn & Subscribed to before me }  
this 30th day of Oct. 1907. }

PHILIP F. W. AHRENS,  
Notary Public.

[NOTARY'S SEAL]

We, the undersigned, Albert Kessler and  
Otto G. Nestle do hereby accept the trust 3038  
and agency conferred upon us by Kessler &  
Company, Limited, of Manchester, England,  
and agree to act faithfully as agents of the  
said Kessler & Company, Limited, in the  
premises.

IN WITNESS WHEREOF we have hereunto  
subscribed our names this 30th day of Oc-  
tober, 1907.

ALBERT KESSLER  
OTTO G. NESTLE."

(Then follows acknowledgment by Albert Kessler and Otto G. Nestle on the 30th of October, 3039  
1907.)

ELEVENTH.—Kessler & Company of New York  
notified Kessler & Company, Limited, of Manchester,  
of the delivery of the two escrows by letter  
as follows:

"NEW YORK, 25 Oct. 1907.

Messrs. KESSLER & Co. LIM.  
Manchester.

DEAR SIRS:

We handed Mr. Henry Kessler today, your  
two escrows as per list enclosed, please can-

3040

cel old list. You will notice we have put Daimler pfd in your escrow in place of common. We think eventually we ought to get something for the common stock too.

Mr. Henry Kessler took a separate vault box for these escrows, & Mr. Albert Kessler, Otto G. Nestle & North McLean have access to same. The box is in name of K. & Co. Lim Manchester, No. 2097.

Yours truly,

KESSLER & Co."

The list enclosed was as follows:

3041

"Escrow Kessler & Co., Ltd. Manchester.

2428 sh. United Lighting & Heat 10	\$24,280.
1606 " " in Manchester 10	16,060.
1341 " Daimler Mfg. Co. pfd. 100	134,100.
\$56,000 United Breweries, 1st M.	
6's .....	80 44,800.
50,000 United Breweries Notes ..	50,000.
1000 sh. Underground El., Ldn. }	
full paid .....	
2000 sh. Underground El., Ldn. }	49,663.13
Beneficial Cert. ....	
70 sh. Standard Roller Bearing,	
\$50 share .....	60 4,200.
2042 100 sh. Standard Roller pfd....	50 5,000.
10,000 sh. Elkton Mining Co. ....	50 5,000.
500 sh. U. S. Red. & Ref. Co. pfd.	25 12,500.
1000 sh. " com.	10 10,000.
\$45,000 Pittsburg. Westmoreland &	
Som. 1st 5's .....	95 42,750.
12,000 Ind. Col. & East Tract 1st	90 10,800.
288 sh. Muskogee Gas & Elect.	
Com. ....	20 5,760.
288 sh. Muskogee Gas & Elect.	
Pfd. ....	60 17,280.
\$22,000 Muskogee Gas & Elect.	
Refdg. ....	87 19,140.

Bedford Avenue Property .....	31,000.	3048
Western Pacific, Syn. rect. ....	7,234.28	
548 sh. Chicago Gt. Westn. Pfd. B. 10	5,480.	
\$20,000 Orleans County Quarry		
Co. 1st .....	90	18,000.
		<hr/>
	\$513,047.41	

Kessler & Co., Ltd., Special Escrow, £20,000, 60 d. s.		
\$25,000 Orleans County Quarry ..	\$22,500.	
Note, Milne, Turnbull & Co., due		
Nov. 11 .....	16,000.	
Note, Milne, Turnbull & Co., due		
Dec. 27 .....	7,000.	3044
Note, Milne, Turnbull & Co., due		
Dec. 27 .....	17,000.	
Note, R. B. Maclea Co., due Dec 5	5,000.	
300 sh. Cripple Creek, Com.....	67	20,100.
466 " " Pfd.....	"	31,222.
		<hr/>
	\$118,822."	

TWELFTH.—On October 15th, 1907, Kessler & Company of New York drew draft as follows:

"Ninety days after sight this first of exchange, second unpaid, please pay to the order of Colonial Bank, Five Thousand Pounds sterling, value received. Charge same to account of Kessler & Company. To MESSRS. KESSLER & COMPANY, Manchester.

Payable in London. No. 203,265."

This draft was accepted as follows:

"Accepted 25th of October, 1907, payable at Lloyd's Bank, Limited, 71 Lombard Street.

KESSLER & Co., LIMITED,  
P. W. KESSLER, Director."

3046 The following memorandum was also endorsed on said acceptance:

"The Colonial Bank is admitted a creditor, £5,000, in respect to this acceptance. December 16, 1907. KESSLER & Co., LTD. FRANK YOUATT, Liquidator."

THIRTEENTH.—On October 25th, 1907, Henry Kessler notified Kessler & Company, Limited, of Manchester, by cable as follows:

3047 "Have secured escrow. Financial affairs critical. Cannot sell demand. Is it possible arrange with Lloyd's Bank, Limited, cash loan against Cripple."

FOURTEENTH.—On the 25th of October, 1907, Henry Kessler wrote to P. W. Kessler, of Kessler & Company, Limited, as follows:

"KESSLER & Co. 54 Wall Street,  
Bankers.

NEW YORK, 25th October, 1907.

DEAR WILLY:

3048 I wrote you on the 22nd inst. & received your 2 letters of 15th & 16th inst.; we have had two very miserable & exciting days here; you will have seen all from the papers how Morgan & others helped the Stock Exchange with funds. Alfred just comes with the news that they will issue Clearing house certificates, this they hope will relieve the money market. The great difficulty is to sell Exchange even checks and this has bothered McLean very much, however he succeeded in getting what he wanted for to-day; but the position is *very awkward* and we must hope that next week the Exchange market will be better as otherwise K. & Co.

like many others would be in a hole. I saw <sup>3049</sup> Guss yesterday. I asked him to buy some of our bills, but he said he didn't know what to do with them.

At the suggestion of Alfred I cabled you today if you could not arrange from Lloyds a Cash advance against Cripple Creek; however I doubt it.

Alfred sold a few stocks, but it is very difficult to get rid of anything & things outside the Stock Exchange are unsaleable and that is the reason why stocks have gone down so much.

The Central Trust Co. called today for <sup>3050</sup> the loan of \$100,000; but Alfred could arrange with Wallace to let it lie over until next week. He is naturally very much worried, but I am trying to calm him down. He cabled Flinsch today he wanted \$200,000 by Monday and asked him what he could do to find funds.

You have no idea how things are here. The Trust Co. of America was besieged the last two days by depositors wanting their money. Police on horseback and foot kept order in Wall Street. Of course, we can't say where all this will lead to, but things <sup>3051</sup> seem a trifle better tonight and Saturday & Sunday may help to calm the excitement.

It is strange I anticipated all your ideas about our escrow as you will see from my memo. of yesterday. Your and Eddy's letters strengthened my hands and we acted on it at once. I went with Bertie to the North America Safe Deposit Co., Exchange Place, secured a small safe in the name of K. & Co., Ltd., Manchester, England, and gave power to Bertie, McLean & Nestle—Bacon would not have done—to open this

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safe. The combination No. of the lock is 197 and box No. 2097. We went carefully through all the documents to see that they are all endorsed and in order, the Brooklyn mortgage has a transfer in blank bt Gillett & his wife, the other notes are all endorsed in blank. I think we are safe now, now we are in possession of the documents. Alfred has made out a new list at *reduced* prices amounting to abt \$513,000 against the £80,000 credit. The other £20,000 are in the separate escrow also in our safe. To get anybody to take care of our bills here in case of need would be very difficult, probably impossible. Brooks would have to help us thro' against the securities we could give him. If K. & Co. can pull thro', which I hope, we must get out of this acceptance business or reduce it considerably.

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Alfred telephoned for Gillett to come down, he promised to come in the afternoon, but didn't. It is most harassing and annoying that the man is no good and cannot be tackled. I hope Flinsch will be here soon.

Alfred would like you to see if you cannot get a quotation in London about the Underground Electric London in our escrow.

3054

Saw Hesslein and Ernst yesterday, the latter is coming over next week. I was astonished what a large place theirs is, about 100 clerks and two large warehouses.

Called again on Abbs and asked him to push where he could for remittances. Hennings I saw this afternoon. He promised a small order presently. McLea I didn't find in but saw some of the goods he gets from Reade & Wall very fine and tasteful things up to 18. If Heide could find some



stuffs like it for Hesslein we could do a 3055 big business.

The rest of the day I spent at Wall Street and must say I have by now had more than enough of it. I hope I can get off by Baltic next week but will first see how things are going here before I decide. \* \* \*

Betrie and Nestle dined with me yesterday and they want to take me a motor ride to-morrow. \* \* \*

FIFTEENTH.—On or about the 7th of October, 1907, Henry Kessler received a cablegram from Manchester from P. W. Kessler, who at that time 3056 appears to have been in charge of the Manchester Company, as follows:

"Flinch here twelve A. M. Their positions not at all satisfactory. Please consult A. K. Would advise selling stocks. Are trying here arrange loan against Orleans Cripple; success doubtful. Do not approve of more Manchester. What is best that can be done?"

And on the 8th of October, 1907, Alfred Kessler wrote to his partner, Mr. Flinsch, as follows:

"Yesterday we got your and Willie's cable to Henry, who could give me no advice and 3057 went to Philadelphia. The cable read: 'Flinch here twelve A. M. Their position not at all satisfactory. Please consult A. K. Would advise selling stocks. Are trying here arrange loan against Orleans Cripple; success doubtful. Do not approve of more Manchester. What is best that can be done?' This last sentence is the great conundrum which cannot be solved. To-day I cabled reply, 'Henry Kessler, Philadelphia. We have arranged balance Orleans. Flinsch's father should help.'"

3058 SIXTEENTH.—On the 24th of October, 1907, Henry Kessler sent a letter, called in his letter of the 25th "memo. of yesterday," in which he told P. W. Kessler of the advice Messrs. McLaughlin, Russell, Coe & Sprague had given him the day before with regard to his obtaining possession of the securities, and on the 25th of October, 1907, in the morning, Henry Kessler received a letter from P. W. Kessler advising him to see about the escrow and perhaps consult lawyers and see what ought to be done in case of necessity.

On the 25th of October, 1907, Alfred Kessler cabled Flinsch as follows:

3059 "Financial affairs critical. Cannot sell demand. Central Trust Company has called loan one hundred thousand. We require one million marks October twenty-eighth. Can you obtain?"

Henry Kessler was informed on October 25th that Alfred Kessler had cabled abroad for \$200,000; that is to say, he was informed of the contents of the said cable to the effect that Kessler & Company required 1,000,000 marks (\$200,000) by October 28th.

SEVENTEENTH.—The statements of facts relevant  
3060 to the controversy herein involved contained in the letter of Henry Kessler to P. W. Kessler, of Kessler & Company, Limited, set forth in the Fourteenth Finding of Fact, I find to be correct and true statements of such facts.

EIGHTEENTH.—On the 29th of October, 1907, Henry Kessler sent a cablegram to Kessler & Company, Limited, of Manchester, as follows:

"Escrow in my strong box. Estimated value six hundred thousand. Perhaps realize eventually three hundred thousand. Stocks in negotiable shape, private invest-

ments, with coupons, in my strong box. Not <sup>3061</sup>  
advisable to disturb stocks at the moment  
for transfer."

On the 30th of October, the following cablegram  
to Kessler & Company, Limited, of Manchester, was  
sent by Henry Kessler:

"Assigned Kisskin advice ask Lloyds Bank  
Limited Manchester advance against col-  
lateral escrow. Cannot obtain advance here  
now \* \* \*

The words "assigned Kisskin advice" mean that  
Kessler & Company of New York had made an as- <sup>3062</sup>  
signment pursuant to the advice of Kissell, Kinn-  
cutt & Company.

NINETEENTH.—The Knickerbocker Trust Com-  
pany suspended payment on Tuesday, the 22d of  
October, 1907, and immediately thereafter a run by  
depositors began on the Trust Company of America,  
which continued for several days thereafter. On  
October 23d, 24th, 25th and 26th, it was exceedingly  
difficult to borrow money in New York City. On  
Friday, the 25th, money was loaned in Wall Street  
at 115 per cent. On Monday, the 28th, and Tues-  
day, the 29th, Alfred Kessler applied to various in- <sup>3063</sup>  
stitutions and individuals for loans, without suc-  
cess. On Friday, the 25th, the Central Trust Com-  
pany called a loan of \$100,000, but, at the request  
of Kessler & Company, payment of the loan was  
extended until the following week. The City Na-  
tional Bank loan of \$100,000 and a loan  
of some \$90,000 of the Mechanics' Bank, aggregat-  
ing \$190,000, were taken up by J. P. Morgan & Com-  
pany, who received from the City National Bank  
and the Mechanics' Bank the collateral se-  
curity of Kessler deposited for those loans. Dur-  
ing the weeks beginning October 21st and October

3064 28th, in addition to the Morgan loan, Kessler & Company obtained a loan from the Merchants' National Bank of twenty or twenty-five thousand dollars. They required during the week commencing October 28th to meet their liabilities in Europe some \$500,000. On the evening of the 29th of October, after conference with Kissell, Kinnicutt & Company, Alfred Kessler concluded to make a general assignment, and thereupon, on the 30th of October, a general assignment was made for the benefit of creditors, which assignment was executed by Alfred Kessler on behalf of the firm. This assignment recited that the firm was unable to pay  
 3065 its debts in full. Flinsch was at that time on board a steamer coming from Europe, and Gillett, the other partner, was ill and did not attend to any business at the office.

TWENTIETH.—There was no substantial change in the pecuniary condition of the firm between the 25th and the 30th of October. The chief business done during that period was in foreign exchange, and the result thereof was a loss of about \$500. During those days, Alfred Kessler tried to get moneys for the firm from his partner, Gillett, or from Flinsch's friends in Europe or by obtaining loans, but was disappointed in his expectations,  
 3066 and on the 30th the assignment for the benefit of creditors was made. Up to and including October 29th, the firm of Kessler & Company of New York met their obligations as they matured.

A petition in involuntary bankruptcy was filed against the bankrupt firm on November 8, 1907, and Lawrence E. Sexton was on that day appointed Receiver, and thereafter the firm were adjudicated bankrupts. Schedules of the firm's assets and liabilities were filed on December 26th, 1907.

TWENTY-FIRST. From the early part of the year 1907, down to their bankruptcy, the great bulk of

the assets of Kessler & Company consisted of securities which were not listed on the New York Stock Exchange. During this period, it was difficult to sell these securities even at a great sacrifice, and difficult to borrow money thereon. Many of these unlisted securities had been carried by the house for a period of one, two and three years, and had been acquired in large part in various underwritings which had not been successful, and the firm were compelled to take over the securities and had been waiting for a favorable time to sell them. During this period, there was a decline in price not only of unlisted securities, but in first-class securities. In May, 1907, a verdict in the Supreme Court for \$140,000 had been obtained by a creditor against the firm, and Flinsch, when in Paris, had an interview with the creditor with a view to settling the case, and stated to him that a judgment would have an injurious effect upon the credit of the firm. 3067 3058

In June, 1907, Flinsch went abroad, arriving in London on the 25th, and remained in Europe until a few days before the assignment of his firm. While abroad, he made various efforts to strengthen the financial condition of the firm. These efforts were, in the main, unsuccessful, and the drawing accounts of Kessler & Company upon their various correspondents in Europe were curtailed instead of increased. Flinsch, during his absence in Europe, corresponded frequently with Alfred Kessler in New York, informing him of such efforts and their result. By the letter of July 18th, 1907, he reported to Alfred Kessler, among other things, as follows: 3069

"What surprises me regarding these credits, which are being called, is the fact that they were not called sooner. I have never found people as blue as at present. It does not surprise me. I have been looking forward to it for the last eighteen months.

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I advise you strongly to make some temporary drawing arrangement with Manchester for twenty thousand pounds. \* \* \*

"I think it impossible to get credits in new directions; in fact, I think it impossible just at present to get old ones renewed. \* \* \*

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The subsequent letter indicated that Flinsch was endeavoring to collect from his father and brothers moneys owing to Kessler & Company, apparently being the subscriptions for securities that Kessler & Company had put on the market. With respect to the collection of his father's account, Flinsch is fearful of the effect of showing to the Frankfort banking circles Kessler & Company's need of money.

TWENTY-SECOND.—Among other business carried on by Kessler & Company was that of financing the business of the dry goods firm of Milne, Turnbull & Company. The business of Milne, Turnbull & Company was in an unsatisfactory condition, and in one letter Flinsch urged the sale of the stock of goods of Milne, Turnbull & Company at any price. In the course of his correspondence with Alfred Kessler, he suggested that the latter call in outstanding accounts receivable.

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While abroad, he saw P. W. Kessler, of Kessler & Company, Limited, first at Baden-Baden on September 17th, and about the 7th of October at Manchester. That the financial condition of Kessler & Company of New York was discussed in the interview between Flinsch and P. W. Kessler at Manchester on October 7th is apparent from the cablegram of P. W. Kessler to Henry Kessler, in which the visit of Flinsch is referred to. This cablegram is set forth in the Fifteenth Finding.

TWENTY-THIRD.—The relations between Kessler & Company of New York and Kessler & Company, Limited, of Manchester, were exceedingly close and

marked by mutual good-will and confidence. The 3073  
correspondence by mail was frequent, and this correspondence shows that the Manchester Company was posted from time to time as to the financial condition of the New York firm. Some of the correspondence relative to the "escrow" passed through the private letter books of Kessler & Company. The following letter, under date of August 27th, 1907, was sent by Alfred Kessler to P. W. Kessler of Manchester, and received by him:

"I have yours of 25th July, 3rd and 14th Aug., and the worries I have gone through in the last two weeks have been phenomenal. Cables and correspondence with Flinsch and 3074 others have taken up most of my time. I communicated at once to Flinsch what you had heard from Frankfort, thinking it was much wiser to let him know.

"Flinsch's brother Edgar paid Mks. 45,000 and Remy Mks. 10,000. His father promises Mks. 100,000, but we have not got it. Mr. De Neuville paid everything she owed and his wife Olga \$6,200, plus \$15,000, which I expect any day now.

"Drawing. Not having been able to sell Fcs. 770,000 against Cripple Cr. stock, we were forced to sell £20,000 Manchester, and 3075 put up escrow as per separate letter \* \* \*

On the 6th of September, 1908, Alfred Kessler, in a letter to P. W. Kessler, acknowledges the receipt of

"your letters of 22 and 23 Aug. and the one to the firm of 23 Aug. and I am dreadfully sorry to have caused you worry. Indeed I have had lots to worry about and often had to take doses to get some sleep. 1893 and 1903 worries were nothing compared to last month for reasons of so many credits being called

2076

and the inability to sell any of our Laager Huets. fr. 1,000,000 long bills on Dreyfus became due and we could not renew. \* \* \* Flinsch has seen Dreyfus in Paris and they have arranged only to be drawn on by us, so I hope the bills by others will not be renewed and there will be little Dreyfus in the Paris market.

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"To-day we were able to sell fcs. 500,000 90 d/s on them and Flinsch has arranged for us to draw on Lou & Co., Zurich, fcs. 500,000. Heine will also discount fcs. 250,000 of bills for us, and the Basler Handelsbank will discount fcs. 250,000 against merchants bills receivable. These two latter P. has only cabled about so we must await their letters next week."

In this and the previous letter he speaks of the difficulties existing between the firm and Gillett, one of the partners. "The Daimler is undoubtedly going to cause us a loss as the Co. was not fully insured by \$100,000 but we could not get any more insurance on it—as it was the \$308,000 was divided in 153 companies."

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Kessler & Company owned substantially the stocks and securities of the Daimler Company.

"Pittsburg Westmoreland earnings are poor. \* \* \* The loss on bonds ten points and stocks 15 to 20 points is also bad but may improve and the market and feeling are much better. MacLea account is very good. Milne, Turnbull account is not good, in fact they have run behind, \$7,000. Shipley Blauvelt account and Orleans County Quarry are both good. Daimler, Pittsburg, Westmoreland and Cripple Creek Central which is so hard to carry are our *betes noires* and the truth is that our condition is not as



good as it was end of last year and how Gil-<sup>3079</sup>  
lett is to get out and we to get a new partner  
unless you is a conundrum. Of course if  
Flinsch sells C. C. C. the two former will  
still trouble us.

"Muskogee Gas and El. fine, earning  
\$30,000 above 6% div. on pfd. \* \* \*

"Loans payable to-day are \$600,000, but  
with exception of \$180,000 are all salable se-  
curities and a great many belong to other  
parties."

At the end of the letter he says:

"Now, dear Willy, please do not worry,<sup>3080</sup>  
as I am doing that for the whole family, but  
don't fail to see Flinsch before he returns."

On the 11th of October, in a letter to P. W. Kess-  
ler, Alfred Kessler wrote as follows:

"I received your letters of 4 and 25 Sept.

"United Brewery bonds are unsalable in  
fact all bonds are except the active ones on  
the stock exchange and those suitable for sav-  
ings banks (of which we have none). The  
earnings for Aug. were very good \$44,000 net  
after fixed charges and they say after 1 Nov.  
they say they expect to boost the price of<sup>3081</sup>  
beer. The bonds are absolutely good and  
situation is much improved. \* \* \*

"In answer to your cable to Henri I cabled  
as per copy enclosed. Flinsch kept promis-  
ing his father would send \$20,000 but he  
never did. I wrote a long letter last mail,  
but what to answer to the last words in your  
cable, 'what is best that can be done,' I am  
sure I cannot say. Stocks are so low now  
I hate to sell and the best houses have many  
more buying orders than selling orders."

3082 In the letter under date of October 17th, Alfred Kessler writes P. W. Kessler as follows:

"Yours of 8th and 9th October also received. No bonds are salable so Bertie could not do anything, see enclosed cutting.  
\* \* \*

"Stock market continues in a very nervous state. Amalgamated div. was cut in half to-day and Otto Heinze & Co. failed. The buying was very good and the public are at last entering the market cautiously. I expect easier money a month hence and bonds ought to improve."

3083

On the 18th of October he says:

"The Mercantile National Bank of which Heinze was president has been taken over by other banks and all of the directors have resigned. The bank had deposits of \$12,000,000.

"I translated your cable to Henri and sent it to him at Atlantic City."

In a letter of the 26th of September, P. W. Kessler acknowledged the receipt of Alfred Kessler's letter of the 6th and says:

3084

"It was much what I expected and not altogether pleasant reading. I sent it on to Eddy for his comments. I am very sorry for you, but with that enormous line of drawings on us, I am afraid I cannot leave all the worry to you. If those drafts should want caring for, we should find ourselves in a very bad hole, and I must say I am not easy.  
\* \* \*

"The stock acct. does seem big in sundries, especially so at a time when a slump seems so likely to come. The worst is that I am afraid there is more to come and that unless

you have got out you will have a further 3085  
shrinkage to face. \* \* \*

"Henri has just gone. He may possibly be useful to you if you are having trouble with Gillett and of course he is also an executor of the estate and can have a say on that head, tho' so far, all this has been mostly in my hands. But he is better at talking than I am and may thereby accomplish more than I should.

"That Westmoreland thing begins to look awkward. I hope you don't have to go on putting more money into it. It ought, of course, never to have been touched. 3086

"Are U. S. Brewery bonds salable yet? I should have thought Chicago might have gradually taken to them. And if you don't care yet to sell your own, some of the people for whom you are carrying might be willing to let go. You just want all the cash you can put your hands on.

"I don't know that I can say anything more, but I do feel anxious and should particularly like to hear how you are getting on with Gillett. \* \* \*

TWENTY-FOURTH.—The securities mentioned in the list set forth in the eleventh paragraph hereof 3087 as 1,606 shares of the United Lighting & Heating Company were not in the "escrow" at the time of their delivery on October 25th, but were in Manchester, England, where they had been in the possession of Kessler & Company, Limited, since about January, 1904. The 10,000 shares of Elkton Mining Company were not in the "escrow" at the time of said delivery, but were in the hands of brokers of Kessler & Company in Colorado. These shares arrived in New York after the assignment, and by Bertie Kessler were turned over and added to the other securities in the "escrow" in the safe deposit

3088 vault which had been taken by Kessler & Company, Limited, and on or about the time of the delivery of the "escrow" to Henry Kessler, Kessler & Company put 1,341 shares of Daimler Manufacturing Company preferred stock in place of 1,341 shares of common stock which previously had been in the "escrow."

TWENTY-FIFTH.—The four drafts each of five thousand pounds, each drawn by Kessler & Company upon Kessler & Company, Limited, of Manchester, each at sixty days' sight, on the 27th of August, 1907, were on that day purchased by J. & P. Coats, Limited, from Kessler & Company of New York, to whom, on the same day, J. & P. Coats, Limited, paid as consideration for the said drafts \$97,550. These drafts were forwarded to Manchester and accepted in due course on the 7th of September, 1907, and became payable on November 6, 1907. On December 4, 1907, J. & P. Coats, Limited, received from the liquidator of Kessler & Company, Limited, in liquidation, a dividend amounting to £625 1s. on each of said drafts.

TWENTY-SIXTH.—The course of dealing with regard to the "escrows" was as follows: Kessler & Company of New York drew long bills—that is, bills at either sixty or ninety days' sight, and occasionally at seventy-two days' sight—upon Kessler & Company, Limited, and about ten days before these long drawings fell due it was the custom of the New York house to send a remittance to cover them. The New York house had never, at any time from the beginning of its drawings on Kessler & Company, Limited, down to the 25th of October, 1907, failed to put Kessler & Company, Limited, in funds to meet any of the drafts which were drawn on them.

**TWENTY-SEVENTH.—Kessler & Company of New York** at all times collected the coupons and interest on the securities in the "escrow" whenever they became payable, and the moneys so received went into the bank account of Kessler & Company of New York and were used for the purposes of their business, never at any time being accounted for to Kessler & Company, Limited; and such was the case where any part of the principal of a note was paid off. In some cases, Kessler & Company of New York took out and sold some of the securities, and in some cases they took them out and used them in some other loan, and the securities so taken out and sold or taken out and used to obtain loans were replaced by other securities.

**TWENTY-EIGHTH.—**The schedules of the assets and liabilities of the bankrupt firm, which were duly verified by the bankrupts, Kessler and Flinsch, on December 26th, 1907, indicate that the liabilities of the firm exceed the assets by over \$250,000, but in the valuation of their assets the securities in the two "escrows" are valued by the bankrupts in the aggregate sum of \$495,000.

I find from the testimony of one of the appraisers appointed herein, who was a competent expert, that the value of the securities in said "escrows" would not probably exceed the sum of \$257,495, including the value of the securities in the special or August "escrow," \$48,300. Making this correction, the excess of liabilities over assets amounts to about \$500,000.

The claims of secured creditors as set forth in the schedules amount to \$2,414,337.83, and the unsecured claims \$1,403,723.36.

Among the assets entered in Schedule B-2b is the item "Promissory notes and securities, \$152,499.38." The collateral for these notes is made up almost entirely of securities not listed upon the Stock Ex-

3094 change or participations in syndicates of doubtful value. Both these classes of securities at the time of the failure were stocks that could only be sold, if at all, at a great sacrifice. The par value of the securities held as collateral for the indebtedness was only \$158,200, so that the estimate of the value of the assets in Schedule B-2b of \$152,499.38 is probably greatly in excess of the value of the securities.

Another item of assets set forth in Schedule B-3a is "Debts due on open account, \$998,601.03." The face value of this item in the schedules is \$1,570,255.69, and the estimated value of the collateral, 3095 made up for the most part of unlisted securities and participations in various syndicates, is \$788,420.36.

One of the items in Schedule B-3a is an indebtedness of Milne Turnbull & Company, entered in the schedule at \$99,582.29, and the value is therein entered at \$81,751.93. A petition in involuntary bankruptcy was filed against Milne, Turnbull & Company on November 13th, 1907, and the value of this asset is problematical.

3096 TWENTY-NINTH.—On the 25th of October, 1907, there were outstanding drafts of Kessler & Company accepted by Kessler & Company, Limited, to the aggregate amount of over \$300,000. Kessler & Company, Limited, thereafter went into liquidation, and thus far a dividend of 12% has been paid by the liquidator on said acceptances.

THIRTIETH.—I find, as a matter of fact, that on the 25th day of October, 1907, when the transfer of the "escrows" was made, Kessler & Company, the bankrupt firm, were insolvent within the meaning of the bankrupt law, and defendants are chargeable with knowledge of such insolvency.

THIRTY-FIRST.—I also find, as a matter of fact, that Kessler & Company, Limited, at the time of

the transfer to it on October 25th, 1907, of said 3097 "escrows" or securities, had reasonable cause to believe that it was intended by said transfer to give it a preference.

THIRTY-SECOND.—I find that the effect of the transfer by the bankrupts to Kessler & Company, Limited, on the 25th of October, 1907, of the securities in the "escrow," hereinbefore mentioned, will be to enable Kessler & Company, Limited, to obtain a greater percentage of its debt than any other of the creditors of the bankrupt of the same class.

The courts hold that a condition of insolvency, 3098 once established, will be presumed to have been the condition for a reasonable time before.

The State of New York *v.* Southern National Bank, 170 N. Y., 1.

The books of the bankrupt and their schedules are competent evidence on the question of insolvency within the four months' period.

*In re* Docker-Foster Company, 10 American Bankrupt Reports, 584; Hackey *v.* Hargreaves Brothers, 13 American Bankruptcy Reports, 164; Opinion, page 169; and cases 3099 there cited; Collier on Bankruptcy, 6th ed., page 477.

The schedules of the bankrupt, as we see, show a deficit of over half a million. The further facts appear by the testimony that a large portion of the assets of the bankrupt consisted of securities that were not listed on the Stock Exchange and, at the date of the 25th of October, 1907, were practically unsalable. An examination of the schedules also indicates that such securities of the bank-

3100 rupt as were listed and could, therefore, be sold were, for the most part, pledged as collateral for loans. A consideration of all the evidence and circumstances in the case, lead, it seems to me, to the inevitable conclusion that on the 25th of October, 1907, the bankrupts were hopelessly insolvent.

The property transferred may be recovered by the trustee irrespective of the intent of the bankrupt in making the payment.

16 American Bankruptcy Reports,  
639.

3101 It is not necessary that any actual fraud should be contemplated by the making of the transfer. If the effect of the transfer is to give one creditor a preference over another in the same class, or to enable such creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, the transfer becomes voidable, if made within the four months' period, upon the adjudication in bankruptcy, and the trustee can recover the property transferred.

Morgan *vs.* First National Bank of  
Mannington, 16 American Bank-  
ruptcy Reports, 639; Opinion, page  
644.

3102

Did Kessler & Company, Limited, have reasonable cause to believe that the transfer was intended to give preference?

Henry Kessler, who actually received and took possession of the securities on the 25th of October, 1907, was the chairman and managing director of Kessler & Company, Limited. In his absence, P. W. Kessler appears to have had charge of the affairs of Kessler & Company, Limited, at Manchester. It is a significant fact that P. W. Kessler suggested to Henry Kessler that he had better get



possession of the securities in the "escrows." In 3103 the letter of Henry Kessler to P. W. Kessler dated the 25th of October, 1907, Henry Kessler says: "It is strange I anticipated all your ideas about our escrow, as you will see from my memo. of yesterday. Yours and Eddy's letter strengthened my hands, and we acted on it at once."

Alfred Kessler's correspondence with P. W. Kessler was full, free and confidential. It clearly advised P. W. Kessler of the precarious condition of the New York firm. As early as the letter of August 27th, 1907, from Alfred Kessler to P. W. Kessler, the latter was informed that "we (*i. e.*, Kessler & Company, the bankrupts,) were forced 3104 to sell £20,000 Manchester and put up escrow as per separate letter."

On the 6th of September, Alfred Kessler wrote acknowledging the receipt of P. W. Kessler's letters of the 22d and 23d of August and says: "I am dreadfully sorry to have caused you worry. Indeed I have had lots to worry about and often had to take doses to get some sleep. 1893 and 1903 worries were nothing compared to last month for reasons of so many credits being called and the inability to sell any of our Laager Huets. Fr. 1,000,000 long bills on Dreyfus became due and we could not renew," etc. He also informed him that 3105 "The Daimler (*i. e.*, the Daimler Company, which Company and its securities were substantially owned by Kessler & Company) is undoubtedly going to cause us a loss, as the company was not fully insured by \$100,000"; informed him also that "Milne, Turnbull account is not good, in fact they have run behind \$7,000"; and informed him also that "Daimler, Pittsburg, Westmoreland and "Cripple Creek Central which is so hard to carry are our *betes noires*."

On the 7th of October, Henry Kessler received

3106 a cablegram from Manchester from P. W. Kessler, in which he says:

"Flinsch here twelve a. m. Their position not at all satisfactory. Please consult A. K. Would advise selling stocks. Am trying here arrange loan against Orleans Cripple; success doubtful. Do not approve of more Manchester. What is best that can be done."

Henry Kessler arrived in this country on the 4th of October. He called at the office of Kessler & Company on the 5th of October and saw Albert  
 3107 Kessler, Mr. McLean and Mr. Nestle, prominent employees in the firm of Kessler & Company, and, on the 7th of October, he there saw Alfred Kessler, besides Albert Kessler and Nestle and McLean. He received the cablegram of P. W. Kessler speaking of the interview with Flinsch and stating that the position of Kessler & Company of New York was not at all satisfactory. He went to Philadelphia on the 8th and did not return to New York until the evening of the 21st, when he saw Alfred Kessler. On the 22d, he visited the office of Kessler & Company. On that day the Knickerbocker Trust Company suspended payment and on the  
 3108 next day a run commenced on the Trust Company of America. He was in New York, except for a journey to Philadelphia on the 23d, all of that week. On Friday of that week, the 25th, the transfer was made.

Henry Kessler was called and examined on the hearings before me. He was not a candid witness. He was evidently upon his guard and testified in a manner calculated to give the impression that the panic in Wall Street during the week commencing October 21st and thereafter had made little or no impression; at any rate, had little or no bearing upon the financial condition of Kess-

ler & Company when, however, his letter of 3109 October 25th was put in evidence, and certain cablegrams which, it was proved, were sent to him and received by him here in New York, were shown to him, his memory was considerably refreshed. The real state of his mind on the day he took possession of the securities is graphically shown by that letter, which is substantially set out in the fourteenth finding herein.

It would seem to be remarkable, considering the close and confidential relations existing between the Manchester Company and the New York house, that Henry Kessler made no inquiries and had no confidential talks with Alfred Kessler or 3110 any of the employees of Kessler & Company who enjoyed their confidence. If no such enquiries were made, then it is fair to conclude that Henry Kessler closed his eyes purposely to what was going on and avoided, as far as he could, making any enquiry into the condition of Kessler & Company.

The testimony of the bankrupts shows, at least, a friendly feeling towards Kessler & Company, Limited, which, perhaps, was only natural, considering the close business and family relations and connections, but their attitude in this regard must be taken into consideration in weighing their testimony bearing upon the question of their insolvency and the knowledge that Kessler & Company, 3111 Limited, had in relation thereto. It was natural that Alfred Kessler should have made every reasonable effort to avoid failure and bankruptcy, and it is natural for a person in his condition to hope against hope and to delay the unavoidable collapse as long as possible. If he had, on the 25th of October, 1907, looked the situation squarely in the face and taken a complete and impartial view of the circumstances of the firm, its liabilities and assets, the nature of its assets and the conditions then existing in Wall Street and generally in the

3112 business world, his conclusion must have been that the firm was insolvent and could not avoid failure.

Sufficient facts and circumstances were brought to the notice of Henry Kessler to put him upon his inquiry. The rule in such cases is stated by the Circuit Court of Appeals in the Eighth Circuit in the case of *Coder v. McPherson*, 18 American Bankruptcy Reports, 523, as follows:

“Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.”

3113

Sufficient facts had been called to the attention of Henry Kessler, who was a person of large business experience and reasonable prudence, to put him upon his inquiry. P. W. Kessler, from the distance of Manchester, was sufficiently alarmed to suggest that Henry Kessler had better get possession of the collaterals. Henry Kessler could not shut his eyes, make no inquiries and take possession of these securities without making himself chargeable with notice of all the facts which a reasonably diligent inquiry would develop.

3114

The rule has recently been set forth in a case in this District in an opinion by Judge Hough, the case being that of *Wright v. Sampter*, 18 American Bankruptcy Reports, 355. At page 357, the court say:

“But obviously facts, whether producing certainty or merely suspicion, must have a mind upon which to operate and affect, and the rule is equally well established that it is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of ‘an ordinarily intelligent man’ (*Grant v. Bank*, 97 U. S. 80; ‘a prudent

business man' (Bank *v.* Cook, 95 U. S. 343; 3115  
 Toof *v.* Martin, 13 Wall. 40); 'a person of  
 ordinary prudence and discretion' (Wager *v.*  
 Hall, 16 Wall. 584; 'an ordinarily prudent  
 man' (*In re* Eggert, 4 Am. B. R. 449); 'a  
 prudent man' (Dutcher *v.* Wright, 94 U. S.  
 553).

The fact is uncontradicted that Henry Kessler  
 was advised by counsel to get possession of the se-  
 curities in "escrow," and it was shown that P. W.  
 Kessler suggested the same course at or about the  
 same time. Why did they wish to get possession of  
 these securities? Because they felt, or, at least,  
 hoped, that the possession of these securities would  
 be a protection *pro tanto* against the indebtedness  
 of Kessler & Company of New York to the Man-  
 chester Company. In other words, they wanted to  
 secure a preference; they wanted to get an advan-  
 tage over other creditors. 3116

I conclude, therefore, as a matter of fact, that  
 Kessler & Company were insolvent on the 25th day  
 of October, 1907, and that Kessler & Company,  
 Limited, had reasonable cause to believe that the  
 transfer on such day was intended to give it a  
 preference, and that the effect of the preference was  
 to enable it to obtain a greater percentage of its  
 debt than any other creditors of the same class. 3117

The contention of the defendant is, in substance,  
 that the transfer, though actually made on the  
 25th of October, related back to the time the ar-  
 rangement for the deposit of the securities in escrow  
 was made, and, therefore, the transfer was not  
 made within the four months. It becomes neces-  
 sary, therefore, to examine the nature of the agree-  
 ment between the parties and the dealings of the  
 parties thereunder, so far as they bear upon the  
 proper interpretation of the agreement.

On the 30th of June, 1903, Kessler and Company  
 of New York notified Kessler and Company,

3118 Limited, as follows: "We have to-day placed in a separate package in our safe deposit vaults the following securities, package marked 'Escrow for account of Kessler & Company, Limited, Manchester.'" A list of the securities follows. "This escrow is intended as a protection against our long drawings against your good selves. Kindly confirm if in order, and oblige."

On July 8th, Kessler & Company, Limited, replied: "We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up 3119 to us and the matter goes in order. If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality."

In December, 1903, Kessler & Company, Limited, wrote to Kessler & Company of New York as follows:

3120 "For the purposes of auditing of our books for our New York balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st of December. We do not think the matter will prove of any difficulty to you. Something in the form of the enclosed is what we require," etc.

This enclosure was as follows:

"We certify that we have specially set aside and hold for your account on this 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities," &c.

This agreement was prospective in its nature. 3121  
 It does not appear that at the time these securities were set aside there were any long drawings against which Kessler & Company, Limited, required or needed any protection. In fact, during the whole period from June 30th, 1903, down to October, 1907, it does not appear that these securities were needed for the protection of Kessler & Company, Limited. On the contrary, it affirmatively appears that Kessler & Company of New York from time to time put Kessler & Company, Limited, in funds sufficient to pay or meet the long drawings of Kessler & Company of New York, on Kessler & Company, Limited, as the same became payable. 3122

In the agreement referred to in the tenth finding of fact, dated the 25th of October, and apparently executed on the 26th by Kessler & Company, Limited, Henry Kessler, Director, there is a recital to the effect that Kessler & Company of New York was indebted to Kessler & Company, Limited, in the sum of Five hundred thousand dollars and upwards and a further recital as follows: "Whereas the said firm of Kessler & Company, of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company, Limited, of Manchester, England, certain securities as collateral to the said indebtedness," etc. 3123

The contention of the respondent that the agreement, as evidenced by these letters and the course of dealings between the parties, transferred the title to these securities to Kessler & Company, Limited, to hold the same in trust, first for their own protection and then for the benefit of Kessler & Company of New York, seems to me to be without foundation. The language used in the letters by the parties and in the agreement of October 25th, and their course of dealing, do not indicate that such was the nature of the agreement. It is natural to suppose that, if the title to these

3124 securities had been transferred in trust for the purpose claimed, the parties would have expressed such intention in apt words; but no such words were used. On the contrary, the words used and the course of dealing whereby Kessler & Company of New York were at liberty to exchange the securities when they saw fit, indicate that the title was to remain in Kessler & Company of New York and that the securities set aside should be for the protection of the Manchester Company when such protection should be required.

The course of dealing whereby Kessler & Company from time to time, and at all times up to 3125 October, 1907, protected Kessler & Company, Limited, by other means than these securities, against their long drawings, indicates that these securities were not to be transferred to Kessler & Company, Limited, unless they were required for their protection.

The letter of July 8th and the certificate which, at the request of Kessler & Company, Limited, Kessler & Company gave on the 31st of December, 1903, show that the property was set aside to be collateral security when required. The certificate is:

3126 "We certify that we have specially set aside and hold for your account on this the 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities," etc.

The use of the word "escrow" has some significance. It indicates here an incomplete transaction. The language used in the letters and certificates and the course of dealing show an intention or promise on the part of Kessler & Company to make a valid pledge at some future time or when required for the protection of Kessler & Company, Limited. The title to the securities did not pass



to Kessler & Company, Limited, either in trust or <sup>3127</sup> otherwise.

The respondent further claims, assuming that the agreement amounted to no more than a promise to pledge, that when the securities were actually delivered upon the 25th of October, the pledge was complete and therefore the pledgee had a good title as against the Trustee in Bankruptcy, and that such pledge must be considered as of the date when the promise for the pledge was made, to-wit, in June, 1903.

Lowell on Bankruptcy, section 86, page 66, says with respect to a promise to give security:

"In this country, a promise to give security <sup>3128</sup> at some future, indefinite time, or when required, or a general covenant for further security, will not authorize the debtor to give and the creditor to receive security under circumstances which would make a preference. In other words, the general and indefinite promise is disregarded. A *bona fide* engagement to convey specific property amounting to an equitable lien will, however, be valid, and this is the test."

To which class of promises does the case at bar belong? Was the promise of Kessler & Company <sup>3129</sup> of New York only a promise to give security at some future, indefinite time or when required, or was it a *bona fide* engagement to convey specific property amounting to an equitable lien and hence valid?

At the time the promise was made, it can hardly be said to amount to an engagement "to convey specific property," for Kessler & Company, Limited, in their letter to Kessler & Company of New York, dated July 8th, 1903, say: "If at any time you have an opportunity of realizing on these securities, or any part of them, you are at liberty to take them

1050

3130 and to replace them by others of equal value, though in that case we should, of course, like to see rather better quality."

In the course of dealing between the parties with respect to these securities, Kessler & Company of New York from time to time took from these securities and put others in their place. In no instance of this kind does it appear that, before doing so, they notified the Manchester Company that they proposed to do so, or consulted with them as to the securities they should take out from, or the securities they should put into, the escrow, so-called. The New York house would notify the  
3131 Manchester Company of what they had done, after the fact, and it does not appear that at any time the Manchester house made any objection or any complaint whatever with respect to this exchange of securities. The conduct of the Manchester Company in this respect was perfectly natural. In the course of dealing, the New York house in all cases, down to the time of its suspension, put the Manchester Company in funds to meet the long drawings. The contingency whereby the escrow would be needed for the protection of the Manchester Company against the long drawings it evidently considered very remote.

3132 The "escrow" as originally constituted, as appears by the letter of June 30th, 1903, was made up of four different classes of securities. The "escrow" when delivered on October 25th to Henry Kessler was made up of twenty items. Of the four classes of securities in the original escrow, only one seems to have remained unchanged, and that is the items of shares of United Lighting & Heating Company stock.

The promise, then, or agreement, at the time it was made, was general and indefinite both with respect to the time and also as to the subject-matter of the promise. That is to say, the promise

amounts to this: "We will at some future, in- 3133  
definite time, or when required, for your protection  
against our long drawings, turn over or transfer  
to you whatever securities there may happen to be  
in the "escrow" after such changes as we may  
have made therein."

The agreement was such a "general, indefinite  
promise" that it must be "disregarded" when, as  
here, the rights of the general creditors intervene.

The question arises, What are the rights of the  
general creditors? I think the opinion of the Cir-  
cuit Court of Appeals in the Eighth Circuit in the  
matter of the Great Western Manufacturing Com-  
pany, 18 Bankruptcy Reports, 259, furnishes an an- 3134  
swer to the question. At page 263, the Court says:

"But the theory and purpose of the Bank-  
ruptcy Act were to distribute the unexempt  
property which the bankrupt owned four  
months before the filing of the petition in  
bankruptcy against him, share and share  
alike, among his creditors of the same class.  
To this end every judgment procured or suffer-  
ed against him, every transfer by an in-  
solvent of any of his property, every con-  
ceivable way of depleting it after the com-  
mencement of the four months the effect of  
which is "to enable any one of his creditors 3135  
to obtain a greater percentage of his debt  
than any other of such creditors of the same  
class," is declared to be a voidable preference  
if the creditor has reason to believe that a  
preference is intended thereby. \* \* \*

"When the agreement is made before, and  
the mortgage or transfer within, the four  
months, the title stands unincumbered by  
the latter at the commencement of the four  
months, and the proceeds of that title are  
pledged under the bankruptcy law for the  
benefit of all the creditors *pro rata*. Any

- 3136 subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him.
- 3137 Any other course of decision opens a new and enticing way to secure preference, nullifies every provision of the law to prevent them, and invites fraud and perjury."

3138 This case illustrates the rule in *Lowell on Bankruptcy* set forth *supra*. The Royston Milling Company, a corporation, was adjudicated a bankrupt on January 6th, 1905. Prior to September 6th, 1904, the Great Western Manufacturing Company had sold, installed and put in operation in the Royston Company's mill certain machinery and material for which the Royston Company gave its promissory notes for some Ten thousand dollars "and an agreement that the title and the right to the possession of the machinery and material should remain in the vendor until the notes were paid, notwithstanding any agreement or security that was or might be taken for the performance of the agreement, and that the payment of the notes should be secured by a mortgage on the mill and its appurtenances, or equivalent security, at the election of the Great Western Company."

This agreement was first filed in the proper county clerk's office within the four months' period prior to the bankruptcy, to wit, on October 8, 1904,

and on October 10, 1904, the Royston Company<sup>3139</sup> (the bankrupt) made a mortgage on the mill and its appurtenances, which was recorded in the office of the Register of the proper county on the same day. The District Court held that the agreement was valid and the mortgage a voidable preference, and the Circuit Court of Appeals affirmed the District Court.

In respect to the machinery and material sold, the decision held that there was a *bona fide* engagement "amounting to an equitable lien," and hence valid, inasmuch as a contract of conditional sale whereby the parties agreed that the title should remain in the vendor until the purchase price was<sup>3140</sup> fully paid was voidable under the statutes of Nebraska by purchasers, attaching creditors and judgment creditors only if not filed in the office of the county clerk, and hence was valid against all other creditors, though unfiled, and therefore against the trustee in bankruptcy, who represented no attaching or judgment creditors.

In this case, the contract of conditional sale created a lien at the time the contract was made, but the agreement that the payment of the notes given for the machinery and material furnished "should be secured by a mortgage on the mill and its appurtenances or equivalent security" did not<sup>3141</sup> create a lien as of the date of the agreement was made but amounted to no more than a promise "or a general covenant for further security," and, in the language of Lowell on Bankruptcy, *supra*, would not "authorize the debtor to give and the creditor to receive security under circumstances which would make it a preference."

So, in the case at bar, no lien upon the escrow was created at the time the agreement was made. There was merely an agreement or promise that a lien should be created by the delivery of the escrow (*i. e.*, of the securities then constituting the escrow)

3142 to the pledgee when required for its protection. Such transfer was made within the four months—in fact, within a few days—of the bankruptcy. The Court in the Great Western Manufacturing Company case held that such a transfer, “which otherwise constitutes a voidable preference, is not deprived of that character or validated by the fact that it was executed in the performance of the contract to do so made more than four months before the filing of the petition.

The cases of *Casey v. Cavaroe*, same *v. National Park Bank*, and same *v. Schuchardt* 96 U. S. Sup. Ct., 467, 492, 494, are cases which have a distinct  
3143 bearing upon the question of law here involved. The Court there held that possession is of the essence of a pledge, and without it no privilege can exist as against third persons, and, further, that where it was agreed that a bank should deposit bills and notes with its president and his partner, by way of pledge to secure a loan made by a third party, and the president delivers them back to the bank officers for collection, with power to substitute other securities therefor, it is not such a delivery and possession as is necessary to create a privilege by the law of Louisiana.

The particular provision of the Law of Louisiana involved was this: “That where a debtor wishes to  
3144 pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock or other evidences of the claims or rights so pawned, and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith.”

The plaintiff in that case was the Receiver of the debtor bank. At or about the time of the failure of the bank, the president took the bills and securities and delivered the same to his firm of C.

Cavaroc & Son, who claimed to hold them as agents <sup>3145</sup> for the Societe de Credit Mobilier of Paris by way of pledge to secure said Societe for certain acceptances of bills drawn by the bank in the July previous. The plaintiff, the receiver, sued, claiming that the transfer was void under the provision of Section 5242 of the National Banking Act. That section is as follows:

"All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, securities on real estate or of judgments or decrees in its favor; all de- <sup>3146</sup> posits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor over another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against <sup>3147</sup> such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court."

The actual transfer of the securities was made "after the commission of an act of insolvency, or in contemplation thereof," and the plaintiff alleged that the transfer was made with a view to the preference of one creditor to another. The Court takes up and considers the proposition that the receiver stood merely in the shoes of the debtor

3148 bank and had no greater rights than the bank could have had, and says:

“Indeed, it may be laid down as a general rule, as well at the common law as the civil law, that a trustee, assignee or syndic, having the powers and occupying the relations which are sustained by a Receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a *bona fide* purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. That an assignee in bankruptcy has this power cannot well be doubted; and since a national bank cannot be put into bankruptcy, but can only be wound up under the peculiar provisions of the Banking act, the receiver appointed by virtue thereof must have the same power; or the absurd consequence would follow, that the property of a bank disposed of by voluntary conveyances, or Pledges not good as to third persons, would be beyond the reach of creditors.

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“Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; because the assignee only takes such title as the debtor has at the time of the assignment or insolvency. In that case, however, the question of fraud would be admissible as a question of fact, to invalidate



the transaction. But, in the present case, <sup>3151</sup> that question does not arise; or, if it might be raised, it is immaterial. The Credit Mobilier claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons, without possession. Bad faith, it is true, would defeat the pledge though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inex- <sup>3152</sup>orable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods.

“This consideration meets the objection which is urged against the rule, that it would result in giving to the general creditors the benefit of the advances made to the debtor on the faith of the stipulated pledge, inasmuch as the estate is increased to the extent of these advances. It is true that the estate is so increased; but the debts and liabilities <sup>3153</sup> are also increased to the same amount by the demand of the party who makes the advances; the only effect of the rule being, that the latter comes into concurrence with the other creditors on an equality, and not by way of preference; and if the latter derive any benefit from this result, it must be remembered that, in the view of the law, they might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the

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pledge should be sustained, they would have good cause to complain that they had been deceived by the note of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded.

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"These considerations also supply an answer to another suggestion, that equity will consider as done what the parties intended should be done, which it is assumed was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in view of the law been incurred in this case, and such rights have, by the express letter of the law, accrued.

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"The suggestion may also be answered by the fact that it cannot be truly said to have been the intent of the parties to transfer the title. The agreement was only that 'securities of the first class shall be deposited with the firm of Messrs. Cavaroc & Son.' A transfer of the title would have been inconsistent with that unrestricted control over the securities which the bank desired to, and did, retain, and which must be considered as having been assented to by the Credit Mobilier, through the common agent, Cavaroc.

"On this ground, therefore, of want of possession in the pledgee, or of a third person agreed upon by the Parties; and of actual possession and control in the pledger, we feel compelled to hold that the Credit Mobilier had no privilege as to third persons, and that the receiver was entitled to the securities in question."

The facts in the case of *Casey v. National Park Bank* 3157 were as follows:

On or about the 4th of June, 1873, E. H. Reynes, on behalf of the New Orleans National Banking Association, applied to the National Park Bank of New York for a loan of \$150,000, upon the notes of the former, to be secured by a pledge of collaterals. On the 11th of June, the President of the Park Bank, at New York, addressed a letter to Charles Cavaroc, President of the New Orleans National Banking Association, in which he says: "Mr. E. H. Reynes has made an application for a loan to the N. O. National Banking Assn., to be secured by the bills receivable of the Bank. We will loan you \$75,000, payable October 10th, and \$75,000, payable October 20th next. As collateral to these notes, select \$170,000 of your bills receivable of best known names; retain them as deposited by us, sending us a schedule and receipt for them—as held in trust for us and subject to our order." 1358 On the 11th of June, Cavaroc, as President of the New Orleans Bank, sent to the Park Bank, in a letter, two notes of the former for \$75,000, each payable as agreed, and a list of notes and bills receivable, amounting to about \$170,000, with a receipt appended thereto as follows:

"NEW ORLEANS, June 11, 1873. 3159

"Received, in trust, for account of the National Park Bank of New York, from the New Orleans National Banking Association, \$170,084.42, of bills receivable described in annexed statement; said bills receivable being given by the New Orleans National Banking Association, as collateral security of their notes, due respectively on the 10th and 20th of October next, 1873, each for the sum of \$75,000, payable to the order of the National Park Bank of New York.

"C. CAVAROC, President."

3160 In the letter in which these papers were enclosed, Cavaroc, after referring to the two notes, says: "I further enclose statement of \$170,084.42 of bills receivable, held in trust and as collateral security for the punctual payment of the obligations of the bank, with a receipt for the same. As fast as the bills receivable will mature and be paid, I beg the privilege of substituting new collaterals, of which due notice will be given you." The Park Bank, in a letter of June 17th, assented to this request, as follows: "You can make the change of collaterals you mention, advising us of the same, and that you hold the new paper the same as the old, viz.: in trust." 3161 Thereupon the two notes were discounted, and the Bank of New Orleans drew the money therefor.

The bills receivable, specified in the list referred to, were placed in an envelope by the note clerk, handed to Cavaroc, and by him handed to the cashier, who, for a while, kept them in the safe, but afterwards delivered them back to the note clerk for convenience of collecting and renewing those which matured. The same substitutions of particular notes and bills were made from time to time, as was done in case of the Societe de Credit Mobilier, new lists were made, and finally they 3162 were delivered to Cavaroc after the failure of the Bank, who handed them to E. H. Reynes & Co., to keep for the Park Bank of New York.

The bills were never removed from the Bank, and were never indorsed by it, until the bank failed; and were always kept on the portfolio of bills receivable, without any entry on the books or in the reports to show that they had been pledged.

The point in the decision is that there was no such possession by or on behalf of the Park Bank as would constitute a valid pledge as to third persons.

This principle of law, that to make a valid pledge

there must be possession in the pledgee, is not peculiar to the law of Louisiana. It is a general principle of law, and it is the law of the State of New York. 3163

In a late case in the United States Supreme Court, *Security Warehousing Company vs. Hand*, 206 U. S., 415-427, which involved the rights of trustees in bankruptcy against creditors claiming liens on merchandise as security for advances made, the Supreme Court, Mr. Justice Peckham delivering the opinion, states the rule as follows:

"The general law of pledge requires possession, and it cannot exist without it" (citing *Casey vs. Cavaroe, supra*). 3164

In *Ryttenberg v. Schafer*, 11 American Bankruptcy Reports, 664, in this District, Judge Holt, after stating that the lien of a pledge depended upon possession, actual or constructive, held in that case that an equitable lien could not be maintained because there was no specific agreement therefor. Judge Holt there remarks:

"The simple fact in the case is that Raden & Co. wanted to obtain advances without delivering possession of the property, and Schafer, Schramm & Vogel wanted to acquire a lien without taking possession of the property. It was one of the numerous attempts to give a lien, by owners of property while retaining the apparent ownership of it. The law denies any validity to such arrangement whenever bankruptcy occurs and the rights of general creditors are involved." 3165

The Court of Appeals in the late case of *Buffalo German Insurance Company vs. Third National Bank*, 162 N. Y., 170, thus states the rule:

"Possession is of the essence of the pledge, in order to raise a privilege against third

3166 persons" (citing *Casey vs. Cavaroc*, 96 U. S., 467, and *Wilson vs. Little*, 2 N. Y., 443).

The decision of the United States District Court for the District of Massachusetts, in the case of *Wood vs. U. S. Fidelity & Guaranty Company*, 16 American Bankruptcy Reports, 21, cited by the counsel for the defendant, if inconsistent with the decision in the matter of *Great Western Manufacturing Company*, cited above, must be overruled by the latter decision, which is a subsequent decision by the United States Circuit Court of Appeals in the Eighth Circuit. Further, the *Wood* case is distinguishable from the case at bar in the nature of the language used, which was held to have created a lien as against the trustee in bankruptcy. In the *Wood* case the language used was:

"We do further agree in the event of our being unable to complete or carry on the aforesaid contract, to assign, and we do hereby assign such plant as we may own or have upon said work to the said United States Fidelity & Guaranty Company."

There is no such language in the case at bar.

3168 The special "escrow" of August 27th, 1907, was not created or set apart until that time, and therefore the original agreement, as well as the transfer of these particular securities, was made within the four months' period.

Counsel for defendant contends that the net result of the dealings during the four months was an increase in the assets; that such assets "was increased by the sale of defendant's acceptances." The "*acceptances*" were not sold; the drafts were sold and the money received therefore *before* they were accepted.

If the drafts had not been accepted, the purchasers would have had a claim for the amount thereof

against the drawers alone; if the drafts had been paid, as well as accepted, then defendant, and not the purchasers, would have had a claim against the drawers for the amount thereof; and in either case the liability or debt of the drawers would have been increased by the same amount. 3169

In my opinion Kessler & Company, Limited, and its liquidator have no title to or lien upon the securities called the "Special Escrow of August, 1907." It follows that Messrs. J. & P. Coats, Limited, the intervening creditors, have no rights in the premises and are entitled to no remedy herein.

My conclusion is that the Trustee is entitled to both the ownership and possession of all the securities mentioned constituting the "escrow," with the exception of the 1,606 shares of United Lighting & Heating Company stock, which stock, since the month of January, 1904, has been in the possession of Kessler & Company, Limited, and that Lawrence E. Sexton, as Trustee of the bankrupts, is entitled to an order or decree accordingly. 3170

With respect to the compensation of the Master, I respectfully submit that this is a difficult or extraordinary case within the meaning of Rule 16 of the Court. I further certify that there is an unpaid stenographer's bill amounting to the sum of \$148. 3171

All of which is respectfully submitted.

Dated New York, April 30, 1908.

(Sgd.) PETER B. OLNEY,

Master.

(Endorsed)—Report and Opinion of Master.—

Filed May 4, 1908.

## 3172 DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3173      LAWRENCE E. SEXTON, as  
             Trustee in Bankruptcy of  
             Alfred Kessler, Rudolf E. F.  
             Flinsch and William K.  
             Gillett, composing the firm  
             of Kessler & Company, and  
             the said KESSLER & COM-  
             PANY, Bankrupts,  
   Complainant,

  AGAINST

  KESSLER & COMPANY,  
   LIMITED,  
   Defendant.

3174      Exceptions taken by the defendant and by Frank  
             Youatt, Esquire, as Liquidator of Kessler & Com-  
             pany, Limited, to the instrument purporting to be  
             a report heretofore filed herein, in the office of the  
             Clerk of the District Court of the United States  
             for the Southern District of New York, by Peter  
             B. Olney, Esquire, as Special Master in Chancery,  
             to whom this case was referred as such Master  
             to take the testimony in this case and to report the  
             same to this Court with his opinion.

FIRST EXCEPTION.—Defendant excepts to the  
             finding of fact numbered "Second," and more es-  
             pecially to that portion thereof which finds that  
             the defendant had a branch office in New York.  
             As ground of exception defendant alleges that there



is no evidence in the case to sustain such finding <sup>3175</sup>  
of the Master.

**SECOND EXCEPTION.**—Defendant excepts to the finding of fact numbered “Sixth,” and more especially to that portion which finds that “in no case does it appear that Kessler & Company of Manchester objected to any of the changes made.” As ground of exception defendant alleges that said finding is irrelevant and immaterial and that the correspondence (Defendant’s Exhibit A) shows that at all times subsequent to the original deposit of the securities in June, 1903, changes were immediately reported to the defendant, and complete <sup>3176</sup> and detailed report made as to the value and character of all securities which were deposited in place of those taken out and that the defendant exercised the closest and most careful scrutiny over said charges.

**THIRD EXCEPTION.**—Defendant excepts to the finding of fact numbered “Seventh,” and more especially to that portion thereof which finds that “Kessler & Company of New York in a memorandum book, which was called the Loan Book, made certain entries relative to these transactions.” As ground of exception defendant alleges that there is <sup>3177</sup> no evidence in the case to sustain the finding that this was a memorandum book, but that the testimony of William E. Magie, the Cashier of Kessler & Company of New York, shows that the books which were kept by him as Cashier in which were entered a record of securities were called “Owners of stocks and Bonds,” “Stocks”, “Bonds”, and the Loan Book, and that the Loan Book was the book which contained a record of securities for loans made by Kessler & Company of New York, and that the entries in this loan book were made by him or under his direction, were correctly made at the time

3178 he made them, were made in the regular course of business, and were correct when they were made, and that these securities were properly entered in the said Loan Book as securities which had been deposited as collateral for a loan from Kessler & Company, Limited of Manchester, England, and that the said William E. Magie was continuously from June, 1903, down to October 25th, 1907, the custodian of all the stocks, bonds, notes and other securities, and that the aforesaid books were the proper records kept by him in the regular course of his business which showed the person or persons to whom the said securities belonged and the  
 3179 place and manner in which they were deposited; that the entries in said Loan Book clearly showed that these securities were the property of the defendant and were no part of the available assets of the bankrupts and could not be used by the bankrupts either as a basis of credit or in the ordinary course of their business.

FOURTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Eighth," and more especially to that portion thereof which finds that Kessler & Company of New York did withdraw certain of the securities from the "Special escrow" and substituted others in their place and that on  
 3180 the 20th day of September, 1907, the 27th day of September, 1907, and the 10th day of October, 1907, certain specified securities were so withdrawn. As ground of exception defendant alleges that said finding is irrelevant and immaterial and it appears as part of the same finding that no permission or authority was given by the defendant to Kessler & Company of New York to withdraw any of these securities and substitute other securities therefor.

FIFTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Ninth," and more

especially to that portion thereof which is con-3181  
tained in the first two paragraphs thereof and  
which finds in effect that Henry Kessler upon his  
arrival in New York on October 4th, 1907, visited  
the office of Kessler & Company of New York on  
October 5th, 1907, and on October 7th, 1907, and  
then went to Philadelphia on October 8th, 1907,  
and then went to Atlantic City, and returned to  
New York on the 21st of October, 1907, and that  
certain communications from the Manchester  
Company were forwarded by Kessler & Company  
of New York to Mr. Henry Kessler and received  
by him during his absence from the City, and that  
on October 21st, 1907, Alfred Kessler and his wife 3182  
dined with Henry Kessler at the latter's hotel, and  
that on October 22nd, 1907, Henry Kessler visited  
the office of Kessler & Company of Wall Street,  
and that on October 22nd, 1907, the Knickerbocker  
Trust Company closed its doors, and the acute  
financial panic began and continued during the  
rest of that week and the following week and for  
sometime thereafter, and that Henry Kessler re-  
mained in New York during the week ending Sat-  
urday the 26th of October, with the exception of  
a visit to Philadelphia on the 23d and that on the  
24th and 25th of October he visited the office of  
Kessler & Company, and that on October 23rd, 3183  
1907, the run was begun upon the Trust Company  
of America, whose offices are at No. 37 Wall Street,  
which run persisted for many days, and that for  
several days Wall Street was crowded with de-  
positors seeking to withdraw their deposits, and  
that there was great excitement in the Stock Ex-  
change, and that rates for money were quoted at  
115, and that unlisted securities and securities  
other than first class securities could not be sold  
at any price. As ground of exception the defend-  
ant alleges that said finding is incompetent, irrel-  
evant and immaterial, and has no bearing on any

9184 issue in this case, and there is no evidence in this case that Henry Kessler at or prior to the time when he took possession of the securities on the 25th day of October, 1907, had reasonable cause to believe that Kessler & Company of New York were insolvent, but on the contrary their books of account show them to be solvent and no member, employee or creditor of the said firm believed them to be otherwise nor had the said firm ever up to that time defaulted in any of its payments nor given the slightest indication of its inability to meet its obligations in full as they became due.

3185 SIXTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Tenth.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and relates solely to matters which happened subsequent to the 25th day of October, 1907, when Henry Kessler took possession of the securities.

SEVENTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Eleventh.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and that matters therein referred to happened subsequently to the time when Henry Kessler took possession of the securities.  
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EIGHTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Thirteenth.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and that said cablegram was sent subsequent to the time when Henry Kessler took possession of the securities.

NINTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Fourteenth.” As ground

of exception defendant alleges that said finding is 3187 incompetent, irrelevant and immaterial and that the letter therein referred to is no evidence of the insolvency of Kessler & Company of New York, and no evidence that a preference was intended and no evidence that the said defendant had reasonable cause to believe either that Kessler & Company of New York were insolvent or that a preference was intended, and that said letter was written subsequent to the time when Henry Kessler took possession of the securities.

TENTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Fifteenth." As ground 3188 of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and that the cablegram therein referred to as having been received by Henry Kessler from P. W. Kessler, as explained by the testimony of Rudolf E. F. Flinsch as to the latter's conversation with P. W. Kessler on October 7th, and as reported by the said Flinsch in his letter to Alfred Kessler dated October 8th, 1907, is no evidence either of the insolvency of Kessler & Company of New York or that the defendant had reasonable cause to believe them insolvent, or that the defendant had reasonable cause to believe that a preference was 3189 intended on October 25th, 1907, and has no bearing on any issue in this case; and that the letter dated October 8th, 1907, from Alfred Kessler to Flinsch is incompetent, irrelevant and immaterial, is not binding upon this defendant, was not shown to have been communicated to this defendant and was not admissible as evidence of insolvency.

ELEVENTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Sixteenth." As ground of exception defendant alleges that the portion of said finding contained in the first para-

- 3190 graph thereof is incompetent, irrelevant and immaterial and that there is no evidence in this case to show that said letter had been received by Henry Kessler at the time he took the securities, but on the contrary the evidence shows that possession of the securities was taken under the direction and advice of defendant's lawyers, which was given on October 24th, 1907. As further ground of exception defendant alleges that the cablegram referred to in said finding was incompetent, irrelevant and immaterial, not binding upon this defendant and there is no proof that this defendant knew the contents of said cablegram. As further ground of exception
- 3191 defendant alleges that the portion of said finding which is in effect that Henry Kessler was informed on October 25th that Alfred Kessler had cabled abroad for \$200,000, and that Henry Kessler was informed of the contents of said cable to the effect that Kessler & Company required One Million Marks by October 28th, is incompetent, irrelevant and immaterial, and that such information was received by Henry Kessler subsequent to the time when he took possession of the securities, and the securities were taken under the direction and advice of defendant's lawyers given the day before said cablegram was sent.

- 3192 TWELFTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Seventeenth." As ground of exception defendant alleges that there is no evidence in this case to support such finding and further that said finding is incompetent, irrelevant and immaterial and has no bearing on any issue in this case, and further that said letter was written subsequent to the time when possession of the securities was taken by defendant and more than a day after defendant's lawyers had directed and advised taking the same.

THIRTEENTH EXCEPTION.—Defendant excepts to 3193  
the finding of fact numbered "Eighteenth." As  
ground of exception defendant alleges that said  
finding is incompetent, irrelevant and immaterial.  
The cablegrams referred to having been sent on  
October 29th and 30th, respectively, which was  
subsequent to the time when Henry Kessler took  
possession of the securities and which was at or  
subsequent to the time when Kessler & Company  
of New York had decided to make a general as-  
signment for the benefit of creditors.

FOURTEENTH EXCEPTION.—Defendant excepts to  
the finding of fact numbered "Nineteenth." As  
ground of exception, defendant alleges that said 3194  
finding is incompetent, irrevelant and immaterial,  
no proof of actual insolvency of Kessler & Company  
of New York, under the definition of the Bank-  
ruptcy Act having been offered, and the said state-  
ments and said findings are no proof of such insol-  
vency, and are circumstances that might be en-  
titled to consideration only after proper evidence  
of such insolvency had been received.

FIFTEENTH EXCEPTION.—Defendant excepts to  
the finding of fact numbered "Twentieth," except  
the last sentence of the first paragraph thereof.  
As ground of exception defendant alleges that said 3195  
finding is incompetent, irrelevant and immaterial,  
and that the bankrupts were not shown to have  
been insolvent under the definition of the Bank-  
ruptcy Act on the 25th of October, 1907, and noth-  
ing contained in said finding shows them to have  
been insolvent on that day or at any other time,  
and that the petition in involuntary bankruptcy  
referred to therein alleged as the sole act of bank-  
ruptcy the making of the general assignment for  
the benefit of creditors on October 30, 1907, and  
the adjudication in bankruptcy which was had  
thereunder is no evidence of insolvency.

3196     **SIXTEENTH EXCEPTION.**—Defendant excepts to the finding of fact numbered “Twenty-first.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial, that it is objectionable on the ground that it is too general and merely a review of portions of the evidence, that the statements of Flinsch to the creditor who had obtained a verdict, and to his partner, and his activities while in Europe, if of any importance, are not binding upon this defendant, are no proof of insolvency, and are not admissible to prove insolvency until proper foundation therefor has been made by the direct proof of insolvency under the definition of the Bankruptcy Act which  
3197     the law requires.

**SEVENTEENTH EXCEPTION.**—Defendant excepts to the finding of fact numbered “Twenty-second.” As ground of exception, defendant alleges that the first portion thereof which finds in effect that part of the bankrupts’ business was that of financing the business of the dry goods firm of Milne, Turnbull & Company, and that the business of the latter firm was in an unsatisfactory condition and that Flinsch in one letter urged the sale of the stock of goods at any price and that Flinsch in the course of his correspondence with Alfred Kessler suggested  
3198     that the latter call in outstanding accounts receivable, is incompetent, irrelevant and immaterial, and is no proof and not admissible as evidence of the insolvency of Kessler & Company of New York on the 25th day of October, 1907, or at any other time. As further ground of exception defendant alleges that the remaining portion of said finding which relates to the interview between P. W. Kessler and Flinsch at Manchester on October 17th, is objectionable because argumentative, that the testimony of Rudolf E. F. Flinsch, and the letter dated October 8th, 1907, from Flinsch to Alfred Kessler



(Receiver's Exhibit 37, S. M., 1024) shows pre- 3199  
 cisely what was discussed at this interview, and  
 there is no evidence to contradict this testimony  
 and letter, and that without proper proof of the in-  
 solvency of said Kessler & Company of New York  
 on the 25th day of October, 1907, said finding is  
 immaterial.

EIGHTEENTH EXCEPTION.—Defendant excepts to  
 the finding of fact numbered "Twenty-third." As  
 ground of exception defendant alleges that there is  
 no evidence in the case to sustain such finding or  
 conclusion of the Master, and that the correspond-  
 ence referred to in said finding was private, per- 3200  
 sonal and confidential correspondence between Al-  
 fred Kessler and his brother P. W. Kessler, and  
 that said correspondence is very voluminous and  
 said finding is improper in that it sets forth  
 selected portions or extracts of certain letters and  
 not the entire letters and said portions to which the  
 Master refers in this finding do not show that the  
 defendant was posted from time to time as to the  
 financial condition of the New York firm and there  
 is nothing contained in these letters upon which a  
 reasonable man would base a belief that Kessler &  
 Company of New York were insolvent on October  
 25th, 1907, and that said finding is incompetent, ir- 3201  
 relevant and immaterial.

NINETEENTH EXCEPTION.—Defendant excepts to  
 the findings of fact numbered "Twenty-fourth,"  
 "Twenty-fifth" and "Twenty-sixth." As ground of  
 exception defendant alleges that said findings are  
 each of them incompetent, irrelevant and imma-  
 terial.

TWENTIETH EXCEPTION.—Defendant excepts to  
 the finding of fact numbered "Twenty-seventh."  
 As ground of exception defendant alleges that said

3202 finding is incompetent, irrelevant and immaterial,  
 and that the transactions stated in said finding  
 were in no manner inconsistent with defendant's  
 title and as a further ground of exception that  
 there is no evidence in the case to sustain the find-  
 ing in effect that where any part of the principal  
 of a note was paid off, Kessler & Company of New  
 York never at any time accounted to defendant and  
 that the correspondence (Defendant's Exhibit A)  
 shows that whenever any of the securities were sold  
 or payments made on account of the principal such  
 sale or payment was immediately reported by Kess-  
 ler & Company of New York to the defendant and  
 3203 other securities of equal value were substituted at  
 the time said payments were made or securities re-  
 moved, all of which were subject to the approval  
 of the defendant, and that during the entire period  
 from June 30, 1903, down to October 25th, 1907,  
 Kessler & Company of New York accounted at  
 regular intervals to the defendant and rendered  
 full and detailed reports without delay of all  
 changes in the securities and the amount and value  
 of said securities was never at any time depleted.

TWENTY-FIRST EXCEPTION.—Defendant excepts  
 to the finding of fact numbered "Twenty-eighth."  
 3204 As ground of exception defendant alleges that said  
 finding is incompetent, irrelevant and immaterial  
 for the reason that the bankrupts herein were a co-  
 partnership, consisting of three individuals, that  
 the petition in bankruptcy was filed both against  
 the individual members and against the co-partner-  
 ship, that there is no evidence in this case as to the  
 value of the assets and property of the individual  
 members of the said co-partnership or any of them  
 and that the schedules in bankruptcy of the co-  
 partnership, taken alone, are not proof of in-  
 solvency within the meaning of the Bankruptcy  
 Act on the 25th day of October, 1907, nor at any

other time. As further ground of exception, de- 3205  
 fendant alleges that the finding from the testimony  
 of one of the appraisers appointed herein that the  
 value of the securities in said escrow would not  
 probably exceed the sum of \$257,495.00, including  
 the value of the securities in the "special escrow,"  
 is incompetent, irrelevant and immaterial for the  
 reason that the testimony of said appraiser clearly  
 shows that most of the securities in question were  
 securities carried by the bankrupts as managers of  
 syndicates and were securities the value of which  
 would be greatly affected by suspension and failure  
 of the bankrupts and the valuation placed by the  
 said appraiser upon these securities was based 3206  
 upon the fact that the bankrupts had suspended  
 and failed. As further ground of exception, de-  
 fendant alleges that the finding that the valuation  
 placed upon certain assets is probably greatly in  
 excess of the value of the securities for the reason  
 that at the time of the failure the collateral con-  
 sisted of stocks that could only be sold at a great  
 sacrifice, is objectionable because it is argumenta-  
 tive, and that the fact that the securities could only  
 be sold at a great sacrifice at the time of the fail-  
 ure, when, as found by the Master, all unlisted se-  
 curities were practically unsalable, was no indica-  
 tion of their value and is immaterial. As further 3207  
 ground of exception defendant alleges that the find-  
 ing that the estimated value of the collateral for  
 debts due on open account in the sum of \$998,601.03  
 is \$788,420.36, is incompetent, irrelevant and im-  
 material, and that the estimated value of the col-  
 lateral deposited for the debts due on open account  
 is not the value of such debts. As further ground  
 of exception, defendant alleges that the finding that  
 an involuntary petition in bankruptcy was filed  
 against Milne, Turnbull & Company on November  
 13th, 1907, is incompetent, irrelevant and imma-  
 terial, for the reason that said involuntary petition

3208 was subsequent to the 25th day of October, 1907, and does not indicate the value of the assets of the bankrupts on the date last mentioned, but on the contrary it may be inferred that the failure of Milne, Turnbull & Company was caused by the prior failure of these bankrupts who were the bankers of Milne, Turnbull & Company.

TWENTY-SECOND EXCEPTION.—Defendant excepts to the finding of fact in said report numbered “Twenty-ninth.” As grounds of exception defendant alleges that said finding is incomplete and inaccurate and not a full and correct statement of  
 3209 the undisputed facts established by the evidence, to-wit: that on the 13th day of July, 1907, and at various dates down to and including the 25th of October, 1907, drafts in the aggregate amount of over \$380,000 were drawn by the bankrupts upon the defendant and sold by the defendant for cash for the face amount, less the discount, and were thereafter all of them duly accepted by defendant, and that one of the said drafts to the amount of £5,000 was so accepted by the defendant on the 25th day of October, 1907, the day on which possession of the collateral was taken and that the defendant went into liquidation only subsequent to the time  
 3210 when these drafts began to mature and subsequent to the time when the petition in bankruptcy was filed in this Court against Kessler & Company of New York and subsequent to the time when defendant was deprived of the use of its collateral under its contract for the purpose of meeting these drafts by the injunction of this Court; that the stipulation of the parties (S. M. Page 1218) shows that a dividend of 12½% had then been paid by the liquidator of the defendant on said acceptances. As further ground of exception defendant alleges that the finding that a dividend of 12% has been paid by the liquidator on said acceptances is immaterial for

the reason that it appears that all of said drafts<sup>3211</sup> had been accepted by the defendant and that defendant was primarily liable upon them and that if defendant is solvent the said drafts would be paid in full out of its assets and that no evidence was taken or could have been taken in this case as to the solvency or otherwise of this defendant, and that the record in this case shows that the defendant is in voluntary liquidation and that Frank Youatt, Esquire, is the liquidator duly appointed for the benefit of the shareholders of the defendant.

TWENTY-THIRD EXCEPTION.—Defendant excepts to the finding of fact numbered "Thirtieth." As<sup>3212</sup> ground of exception defendant alleges that there is no evidence in this case to support this finding, that the finding is a conclusion based on certain portions of the evidence and is contrary to evidence, against the weight of evidence, and contrary to law; that the books of account show the bankrupt to have been solvent on the 25th day of October, 1907; that the adjudication in bankruptcy herein is no evidence of insolvency for the reason that the only act of bankruptcy alleged in the petition was the making of a general assignment for the benefit of creditors by one of the partners on the 30th day of October, 1907; that the schedules of the individual partners were not offered in evidence and<sup>3213</sup> no evidence as to the assets and property of the individual partners was taken; that there is no evidence in the case as to the value of the assets of the bankrupt firm on the 25th day of October, 1907, when it was a going concern; that the value of a large part of its securities was directly and immediately affected by the suspension of the firm on the 30th day of October, 1907; that there is no evidence in this case that defendant had any knowledge of the value of the assets or of the amount of the liabilities of the bankrupts on the 25th day of

- 3214 October, 1907, or any means of knowledge of the same, or opportunity of acquiring the same; that on the contrary, Alfred Kessler, who was the partner in charge of the business of the bankrupts on October 25, 1907, testified that he believed that his firm was solvent on that day, and the testimony of Alfred Kessler, McLean, and Magie all shows that up to that time the firm had not only met all of its obligations, but that it had no trouble in selling all the exchange it needed to meet its maturing obligations, that the amount coming due during the following week was not large, that there was no apprehension or cause for apprehension on October
- 3215 25th, 1907, and that the immediate cause of the suspension was the failure to sell exchange, which occurred unexpectedly and for the first time, and on the 29th day of October, 1907; that the plaintiff has wholly failed with all the books and records of the bankrupts at his disposal, to furnish proof of the insolvency of the bankrupts on the 25th day of October, 1907, of the nature and quality which the law requires and relies wholly upon inference and conjecture; that not only is there no evidence in this case that the defendant had reasonable cause to believe that the bankrupts were insolvent on that day, but on the contrary the conduct of the defendant down to and including the 29th day of
- 3216 October, 1907, and its dealings with the bankrupts are wholly inconsistent with its knowledge of any facts which would lead a reasonable man to believe that the bankrupts were insolvent.

TWENTY-FOURTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Thirty-first." As ground of exception, defendant alleges that there is no evidence in this case to support such finding and that there was no transfer on the 25th day of October, 1907, and that there was no preference on that day and no intention to give a preference, and

that defendant did not have reasonable cause to <sup>3217</sup> believe that any preference was intended when it took possession of its own property under its contract.

TWENTY-FIFTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Thirty-second." As ground of exception defendant alleges that there is no evidence in the case to support the said finding, and that there was no transfer by the bankrupt to the defendant on October 25, 1907, and that if the transaction on that day constituted a transfer then it was a transfer under the contract under which the advances were made, and that the <sup>3218</sup> amount of such advances within about ten weeks prior to October 25, 1907, were greatly in excess of the value of the said securities and that on the very day in question the defendant accepted a draft for £5000; that all of said acceptances, aggregating more than \$380,000, and made within ten weeks prior to October 25, 1907, were made under a contract with the bankrupts by which the defendant should be secured and protected by the transfer and deposit of these securities.

TWENTY-SIXTH EXCEPTION.—Defendant excepts to the following statement, conclusion of law or <sup>3219</sup> alleged finding of fact in the Master's opinion: "The schedules of the bankrupt, as we see, show a deficit of over half a million." As ground of exception defendant alleges that the title under which the plaintiff sues shows that there are four bankrupts and that the schedules of only one of these bankrupts were produced in evidence and that there is no evidence in this case as to the value of the property and the assets of the individual members of the copartnership, and that the schedules of the bankrupt firm which were filed herein do not show a deficit of over half a million.

3220 **TWENTY-SEVENTH EXCEPTION.**—Defendant excepts to the statement in the Master's opinion as follows: "That a large portion of the assets of the bankrupt consisted of securities that were not listed on the stock exchange, and, at the date of the 25th of October, 1907, were practically unsalable." As ground of exception defendant alleges that this finding is immaterial, and that the fact that they were unsalable on that day, at the time of an acute financial panic, does not show that they were valueless, and the evidence of the appraiser referred to in the Master's Report shows that many of them were of very considerable value, even after the  
 3221 failure and bankruptcy of the bankrupts.

**TWENTY-EIGHTH EXCEPTION.**—Defendant excepts to the statement or alleged finding of fact in said opinion as follows: "A consideration of all the evidence and circumstances in the case lead, it seems to me, to the inevitable conclusion that on the 25th day of October, 1907, the bankrupts were hopelessly insolvent." As ground of exception defendant refers to the exception to the finding of fact in said report numbered "Thirtieth."

3222 **TWENTY-NINTH EXCEPTION.**—Defendant excepts to the statement, conclusion of law or alleged finding of fact in said opinion as follows: "The property transferred may be recovered by the Trustee irrespective of the intent of the bankrupt in making the payment."

**THIRTIETH EXCEPTION.**—Defendant excepts to the statement in said opinion as follows: "If the effect of the transfer is to give one creditor a preference over another in the same class, or to enable such creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, the transfer becomes voidable, if made within



the four months period, upon the adjudication in bankruptcy, and the Trustee can recover the property transferred." 3223

THIRTY-FIRST EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "I conclude, therefore, as a matter of fact, that Kessler & Company were insolvent on the 25th day of October, 1907, and that Kessler & Company, Limited, had reasonable cause to believe that a transfer on such day was intended to give it a preference, and that the effect of the preference was to enable it to obtain a greater percentage of its debt than any other creditors of the same class." 3224

THIRTY-SECOND EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "This agreement was prospective in its nature. It does not appear that at the time these securities were set aside there were any long drawings against which Kessler & Company, Limited, required or needed any protection. In fact, during the whole period from June 30th, 1903, down to October, 1907, it does not appear that these securities were needed for the protection of Kessler & Company, Limited."

3225

THIRTY-THIRD EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The contention of the respondent that the agreement, as evidenced by these letters and the course of dealings between the parties, transferred the title to these securities to Kessler & Company, Limited, to hold the same in trust, first for their own protection and then for the benefit of Kessler & Company, of New York, seems to me to be without foundation. The language used in the letters by the parties and in the agreement of October 25th, and their course of dealing, do not indicate that

3226 such was the nature of the agreement. It is natural to suppose that, if the title to these securities had been transferred in trust for the purpose claimed, the parties would have expressed such intention in apt words; but no such words were used. On the contrary, the words used and the course of dealing whereby Kessler & Company, of New York, were at liberty to exchange securities when they saw fit, indicate that the title was to remain in Kessler & Company, of New York, and that the securities set aside should be for the protection of the Manchester Company when such protection should be required."

3227 THIRTY-FOURTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The course of dealing whereby Kessler & Company from time to time, and at all times up to October, 1907, protected Kessler & Company, Limited, by other means than these securities, against their long drawings, indicates that these securities were not to be transferred to Kessler & Company, Limited, unless they were required for their protection."

3228 The letter of July 8th, and the certificate which, at the request of Kessler & Company, Limited, Kessler & Company gave on the 31st of December, 1903, show that the property was set aside to be collateral security when required."

THIRTY-FIFTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The use of the word "escrow" has some significance. It indicates here an incomplete transaction. The language used in the letters and certificates and the course of dealing show an intention or promise on the part of Kessler & Company to make a valid pledge at some future time or when required for the protection of Kessler & Company,

Limited. The title to the securities did not pass <sup>3229</sup> to Kessler & Company, Limited, either in trust or otherwise.

**THIRTY-SIXTH EXCEPTION.**—Defendant excepts to the statement or conclusion of law in said opinion as follows: "At the time the promise was made, it can hardly be said to amount to an agreement 'to convey specific property,' for Kessler & Company, Limited, in their letter to Kessler & Company, of New York, dated July 8, 1903, say: 'If at any time you have an opportunity of realizing on these securities, or any part of them, you are at liberty to take them and to replace them by others of equal value, <sup>3230</sup> though in that case we should, of course, like to see better quality.' "

**THIRTY-SEVENTH EXCEPTION.**—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The contingency whereby the escrow would be needed for the protection of the Manchester Company against the long drawings it evidently considered very remote."

**THIRTY-EIGHTH EXCEPTION.**—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The promise, then, or agreement, <sup>3231</sup> at the time it was made, was general and indefinite, both with respect to the time and also as to the subject matter of the promise. That is to say, the promise amounts to this: 'We will at some future, indefinite time, or when required, for your protection against our long drawings, turn over or transfer to you whatever securities there may happen to be in the escrow, after such changes as we may have made therein.'

"The agreement was such a 'general, indefinite' promise, that it must be 'disregarded' when, as here, the rights of the general creditors intervene."

3232 THIRTY-NINTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "So, in the case at bar, no lien upon the escrow was created at the time the agreement was made. There was merely an agreement or promise that a lien should be created by the delivery of the escrow (*i. e.*, of the securities then constituting the escrow) to the pledgee when required for its protection. Such transfer was made within the four months—in fact, within a few days—of the bankruptcy."

3233 FORTIETH EXCEPTION.—Defendant excepts to the alleged conclusion, or what purports to be a conclusion, in the said Report, as follows: "In my opinion, Kessler & Company, Limited, and its liquidator have no title to or lien upon the securities called the 'special escrow of August, 1907.'"

3234 FORTY-FIRST EXCEPTION.—Defendant excepts to the alleged conclusion, or what purports to be a conclusion, in said report as follows: "My conclusion is that the Trustee is entitled to both the ownership and possession of all the securities mentioned constituting the 'escrow,' with the exception of the 1606 shares of United Lighting and Heating Company stock, which stock since the month of January, 1904, has been in the possession of Kessler & Company, Limited, and that Lawrence E. Sexton, as Trustee of the bankrupts, is entitled to an order or decree accordingly," on the ground that it is contrary to the evidence, against the weight of evidence, contrary to law, and that the facts found by the Special Master in the said report and established by the evidence in this case show clearly that the Trustee is not entitled either to the ownership or to the possession of the said securities or any of them, unless or until he shall have paid the drafts which were drawn by the bankrupts and accepted by the

defendant pursuant to the terms of the contract between the parties, under which the said securities were deposited for defendant's protection. 3235

FORTY-SECOND EXCEPTION.—Defendant excepts generally to the whole report of the Master, and to the finding or conclusion that the defendant has neither the ownership of the said securities nor a valid lien upon the same for the amount of its acceptance good as against the plaintiff herein.

FORTY-THIRD EXCEPTION. — Defendant excepts generally to the whole report of the Master on the ground that it is bad in form in that it does not state separately the findings of fact and the conclusions of law, and that the findings of fact and conclusions of law are not in accordance with the evidence or in accordance with the law. 3236

Respectfully submitted,

McLAUGHLIN, RUSSELL, COE & SPRAGUE,

Attorneys for the Defendant.

Office and P. O. Address:

No. 165 Broadway,

Borough of Manhattan,

New York City.

ABRAM I. ELKUS, Esquire,

FREDERICK C. McLAUGHLIN, Esquire,

3237

RUFUS W. SPRAGUE, JR., Esquire,

Of Counsel.

(Endorsed)—Bill of Exceptions. Filed June 3rd,  
1908.

3238

## UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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LAWRENCE E. SEXTON, as Trustee in Bankruptcy, of Kessler & Company,

Plaintiff.

AGAINST

J. & P. COATS, LTD., impleaded with KESSLER & COMPANY, Ltd.,

Defendant.

In Equity.

3239

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And now comes J. & P. Coats, Ltd., and files its exceptions to the report of Peter B. Olney, Esq., Special Master herein.

FIRST.—It excepts to the finding that in creating the “special escrow” of August 27th, 1907, Kessler & Company did not intend to create a present lien upon and to personally hypothecate the securities and substituted securities covered by said “escrow.”

3240

SECOND.—It excepts to the finding that actual delivery to Kessler & Company, Ltd., by Kessler & Company or any other or different delivery from that found to have been made on or about August 7th, 1907, of the securities covered by the “special escrow” of that date, or that any other or different delivery than was subsequently made of the respective securities substituted for certain securities originally part of said “special escrow” was necessary in order to entitle Kessler & Company, Ltd., to a valid lien of said securities.

THIRD.—It excepts to the finding that the delivery to and possession of Kessler & Company, Ltd., on October 25th, 1907, of the securities then covered by said "special escrow" constituted an unlawful preference in favor of the latter. 3241

FOURTH.—That Kessler & Company have no title to or lien upon the securities covered by the "special escrow" of August 27th, 1907, and which securities were delivered into the actual possession of Kessler & Company, Ltd., on October 25th, 1907, and that J. & P. Coats, Limited, are not subrogated to the rights of Kessler & Company, Ltd.

FIFTH.—That the plaintiff is entitled to the unqualified ownership and possession of the securities covered by said "special escrow" free from any lien thereon in favor of Kessler & Company, Ltd., or of J. & P. Coats, Limited. 3242

SIXTH.—That J. & P. Coats, Limited, are not entitled to the possession of the securities covered by said "special escrow" of August 27th, 1907, as the same remained and are, and as delivered to Kessler & Company, Ltd., on October 25th, 1907, and to a lien thereon for the amount remaining due them (J. & P. Coats, Limited) on the four drafts for £5000 each drawn by Kessler & Company on Kessler & Company, Ltd., on or about August 27th, 1907, and purchased by J. & P. Coats, Limited. 3243

Dated, New York, May 20th, 1907.

W. D. GUTHRIE,  
Solicitor for defendant,  
J. & P. Coats, Limited.

(Endorsed)—Exceptions of J. P. Coates, Ltd. Filed  
May 25th, 1908.

3244

U. S. DISTRICT CO.,

S. D. N. Y.

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 IN RE KESSLER & Co.
 

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 LAWRENCE E. SEXTON,  
 Trustee,

AGAINST

 KESSLER & Co., LIMITED.
 

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3245

Hearing on Exceptions to report of P. B. Olney,  
 Esqr., Special Master.

## MEMORANDA.

Upon the two leading questions of fact tried out before the master, I should, even if in doubt, support the master's findings, as I would the verdict of a jury; the most painful consideration of printed testimony can never supply the deficiency caused by not seeing and hearing the men who testified.

3246 Examination of this evidence, however, leads me to the same conclusion as the master's, and I am of opinion, (1) that on Oct. 25, 1907, Kessler of New York was insolvent within the definition of the Statute, and (2) that if on that day any transfer or conveyance of property was actually made by the New York to the Manchester concern,—the agent of the latter acting therein had reasonable cause to believe that a preference was thereby intended.

I do not suppose that Mr. Kessler of Manchester had thought out the meaning of such legal expressions as "insolvency," "preference" or "reasonable cause," but he did think that the New York house



was in danger of failure, and took the securities 3247 which are the subject matter of this litigation, in order that his company might fare better than others if his New York relatives did not weather the violent financial storm then raging. It is true that Mr. Henri Kessler and, doubtless, all his business associates considered themselves morally and legally entitled to what he took, but this seems immaterial to the present enquiry.

If, therefore, defendant's right, title and interest in and to the property delivered to it on Oct. 25, 1907, sprang into existence on that day, and by virtue of the delivery and transfer then made, such TITLE is invalidated by the Statute, because the act 3248 of transfer under the circumstances involved, and, indeed, itself contributed,—a voidable preference.

If the master's findings of fact are accepted, I have not heard the above proposition doubted or denied.

It is, consequently, incumbent on defendant to show some other right, title or interest in or to the property in question,—existing before the 25th of October, 1907, not obnoxious to the Bankruptcy Act, nor destroyed by subsequent adjudication, and belonging to Kessler & Co., Limited.

Defendant does accordingly assert such a title, defines and describes it as an "Equitable lien," declares it to date from the depositors in "Escrow,"— 3249 and to have been created by the joint effect of such deposit, the contemporaneous exchange of letters between the Kessler houses and the bookkeeping of the New York firm.

To support this assertion, it would seem natural, first, to ascertain what, in point of fact, the parties intended by an "escrow,"—and as the first head of enquiry to ask what light is cast on their purposes by the use of that word.

The probable truth is that no one concerned in the matter knew what "escrow" meant,—yet the

3250 word must have presented some idea to the minds of its users; and, in my opinion, the correspondence does indicate the thought (consonant with law) that the securities were to stay where they were (*i. e.*, in the possession and under the control of the New York house) until new conditions arose or something untoward occurred.

As for bundling up the stocks and bonds, putting them in an envelope marked "Escrow," leaving the envelope in the New York Kessler's safe deposit box, and changing the items at will,—this process, as a method of giving "security", is about equivalent to one man advising another that the latter  
 3251 may consider as his security whatever may at any time be in the first speaker's right hand trousers pocket. And, from a legal standpoint, this matter is not bettered by assuming both parties to be honest, and the security giver scrupulously careful in advising his friend of changes in pocket contents.

It was no other or better indemnity than this which the Manchester house accepted as "security for \* \* \* long drawings," on July 8, 1903; and the intent of parties seems to me quite plainly this, *viz.*: that Kessler of New York should keep on hand—not certain specified securities, but property of sufficient value to enable Kessler of Manchester to repay himself for acceptance of long drawings,  
 3252 in case he either preferred to do so, or found it necessary. It is inconceivable that any English house would prefer to obtain such repayment by liquidating American stocks and bonds of a quality confessedly open to grave criticism; and the final and irresistible inference is that the "security" was to pass into the control of the creditor, for whose benefit it was set aside in "escrow," only when it was deemed advisable to take it in order to prevent other creditors from getting some or all of the same.

To enforce such an agreement as this seems to me <sup>3253</sup>  
open to several fundamental objections.

(A) The contracting party (the bankrupt) did not make any particular property or fund security for the debt by virtue of which defendant seeks to hold what it got on Oct. 25, 1907. Nothing more was done than to agree to keep on hand—not particular specified property, but—property of a particular approximate value, i. e.: the amount of current long drawings. This, in my opinion, does not create an equitable lien within Pomeroy's accepted definition (Eq. Juris. Sec. 1235); and this conclusion is the substantial ground, as I understand it, of the master's decision, in which I concur. <sup>3254</sup>

(B) The phrase "equitable lien" is not complete and self-explanatory. It is a convenient expression, meaning (as Mr. Pomeroy indicates) that if the agreement between the parties is lawful, not only in inception, but when fully carried out, and if when complete it violates no rule of law,—then equity will, as always, follow the law, but will also regard as done that which ought to be done, and give decree accordingly.

To call a lien "equitable," therefore, does not tell the whole story: that adjective relates only to the forum which may be sought for its enforcement, <sup>3255</sup> and the question always remains—what description of lawful lien will be created by the enforcement of the parties' agreement?

In this case that question may be thus put—as suming (apart altogether from the effect of a Bankruptcy Statute) that what was done on October 25th was in pursuance and fulfilment of the parties' agreement,—by what title does defendant hold the securities in question? Clearly, as pledgee. What, then, does "equitable lien" mean, as applied to this transaction? Nothing more than an endeavor to enforce an agreement for a pledge,

3256 unaccompanied by any contemporaneous transfer of possession. In my opinion, no such equitable lien does or can exist; it would be a contradiction in terms, and amount to a most inequitable infraction of the law of pledge.

Buffalo G. I. Co. *v.* Third National Bank, 162 N. Y. 163;

Wilson *v.* Little, 2 N. Y. 446;

Security Warehousing Co. *v.* Hand, 206 U. S. 415.

(C) It may be assumed, and I think correctly, that the original escrow agreement were good *inter partes*. They did not, however, confer any  
3257 present rights enforceable at law.

The test of this seems to me to be the obvious fact that Kessler of Manchester could not have maintained an action of replevin for the securities in question against Kessler of New York—before demand (at all events).

The filing of the petition in bankruptcy, followed by adjudication, produced a creditor (i. e., the trustee), who became entitled to the bankrupt's estate (with exceptions here unimportant) as of a date four months before petition filed. Who owned these securities four months before petition filed?  
3258 Clearly the bankrupt; subject only to the enforcement of a contract under which no demand had been made.

The bankrupt's title, as of that date, vested by law in the trustee; and nothing done by the bankrupt thereafter can destroy it. Unless the bankrupt had parted with title before that time, or made a contract valid in law, so to do *in futuro*, his power and authority is gone.

This bankrupt had made no contract to part with title, to sell or grant absolutely. He had made an agreement to validly and lawfully pledge certain property on demand. Now, it may be assumed that

such agreement was and is void in equity *inter partes*; but equity will not enforce it, as against the rights of other creditors as represented by a trustee in bankruptcy. This I believe to be the law of New York, as disclosed in

Zartman v. 1st National Bank, 189  
N. Y. 273.

Interesting as this subject is, it does not seem necessary to pursue it further. It is wholly a question of New York law, which this court cannot declare with authority, and finds quite difficult to trace through cases, inharmonious in judicial language, though, I think, consistent in result. 3260

The report of the Special Master is confirmed and exceptions overruled.

Master's compensation to be fixed at \$2500, to be paid by trustee, and master will be repaid any stenographer's expenses incurred by him. Final decree will carry costs, but only one-half master's fee will be taxed.

Aug. 20, 1908.

C. M. Hough,  
D. J.

(Endorsed)—Opinion 8/20/08.

3262

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Post Office Building, New York City on the 27 day of Novr. 1908.

Present—Hon. CHARLES M. HOUGH, *Judge*.

3263

LAWRENCE E. SEXTON, as trustee in bankruptcy of ALFRED KESSLER, RUDOLF E. F. FLINSCH and WILLIAM K. GILLETT, composing the firm of Kessler & Company, and of the said KESSLER & COMPANY,

Complainant,

AGAINST

KESSLER & COMPANY, Limited, and Frank Youatt Liquidator and J. & P. COATS, Limited, intervenor,

Defendants.

3264

This cause came on to be heard on the 15th day of June, 1908, upon the exceptions to the report of the Special Master, and was argued by counsel for the complainant, the defendant and the intervenor respectively; thereupon upon consideration thereof, it is

Ordered, adjudged and decreed, that said exceptions filed to said report be and the same are hereby overruled and the report of the said master Peter B. Olney, Esq., be and the same is hereby in all respects confirmed; and it is further

Ordered, adjudged and decreed, that the complainant have judgment as prayed for in his bill of complaint; and it is further 3265

Ordered, adjudged and decreed that the transfer on or about the 25th day of October, 1907, by the above bankrupt Kessler & Company to the defendant Kessler & Company, Limited, of the following property and securities, to wit:

45 Orleans County Quarry Co. first mortgage six per cent gold coupon bonds, numbered 21-45 inclusive, 51-70 inclusive for \$1000. each with coupon No. 4 of April, 1908, and all subsequent coupons attached.

3 notes signed by Milne, Turnbull & Co. to the order of Kessler & Company at four months dated respectively July 11th, 1907, August 27th, 1907, and August 27th, 1907, for \$16,000. \$7,000. and \$17,000. respectively. 3266

Note of the R. B. McLea Company to order of Kessler & Company dated August 5th, 1907, for \$5-000. at four months.

6 certificates of the preferred stock of Cripple Creek Central Railway Company numbered 177-180 inclusive, A 1015, A 946, aggregating 466 shares.

3 certificates of the common stock of the Cripple Creek Central Railway Company each for 100 shares, numbered B 172, B 173 and B 174. 3267

15 certificates of the common stock of the United Lighting & Heating Company numbered 203-205 inclusive, 207-209 inclusive, 213-215 inclusive, 287-290 inclusive, 292 and 293, aggregating 2428 shares.

14 certificates of the preferred stock of the Daimler Manufacturing Company, numbered A 4-A 13 inclusive and A 20-A 23 inclusive, aggregating 1341 shares.

56 first mortgage six per cent coupon bonds for \$1000. each of the United Breweries Company, numbered 472, 819-825 inclusive, 1676, 2051-2070 in-

3268 clusive, 2661-2663 inclusive, 2995-3002 inclusive and 3013-3028 inclusive, with coupon No. 19 for February, 1908, and all subsequent coupons attached.

4 notes of the United Breweries Company each dated September 17th, 1903, to the order of the maker for \$15,000., \$10,000. and \$5,000. and \$20,000. respectively and due September 17th, 1911, September 17th, 1912, September 17th, 1913, and September 17th, 1914, respectively.

Certificate numbered O 168 of the Underground Electric Railways Company of London, Limited, dated August 18th, 1902, to the effect that 1000  
3269 shares of £10 each numbered 293131-294130 are owned by Kessler & Company with assignment in blank; together with two notices of call numbered 395 and 595 by the Underground Electric Railways Company of London, Limited, for £2500 each, and the receipts for the payment thereof.

Certificate No. B 311, dated January 2nd, 1903, issued by the Central Trust Company of New York as trustee to the effect that Kessler & Company is entitled to 2000 shares, of the par value of £1 each, of the Underground Electric Railways Company of London, Limited, in the trust fund under an agreement dated September 8th, 1902, between the  
3270 Metropolitan District Electric Traction Company, Limited, the Underground Electric Railways Company of London, Limited, and the Central Trust Company of New York.

2 certificates of common stock of the Standard Roller Bearing Company, numbered 145 and 196 for 50 and 20 shares respectively; and one certificate of the preferred stock of the said company numbered A 116 for 100 shares; together with all assignments thereof.

10 certificates of stock of the Elkton Consolidated Mining and Milling Company, numbered 30595-30604 inclusive, each for 1000 shares.



5 certificates of the preferred stock of the United States Reduction & Refining Company, numbered 1324-1328 inclusive, each for 100 shares. 3271

10 certificates of the common stock United States Reduction & Refining Company, numbered B 34, B 35, B 74, B 1306-B 13010 inclusive, B 96 and B 97, each for 100 shares.

45 first mortgage five per cent gold coupon bonds due October, 1935, of the Pittsburg, Westmoreland & Somerset Railroad, numbered 201-228 inclusive and 417-433 inclusive, each for \$1000. with coupons numbered 5 for April, 1908, and all subsequent coupons attached.

12 General & Refunding Mortgage 5% twenty year gold coupon bonds, due 1926, of the Indiana, Columbus & Eastern Traction Company, numbered 1618-1829 inclusive, each for \$1000., with coupon No. 4 due May, 1908, and all subsequent coupons attached. 3272

3 certificates of the common stock of the Muskogee Gas & Electric Company, numbered 19-21 inclusive, aggregating 288 shares; 3 certificates of the preferred stock of said company numbered 24-26 inclusive, aggregating 288 shares; 22 first and refunding mortgage 5% gold coupon bonds, due December 1, 1926, of the said Muskogee Gas & Electric Company, numbered 149-170 inclusive for \$1000. each, with coupons numbered 2 for December 1st, 1907, and all subsequent coupons attached. 3273

Receipt No. 5 dated July 6th, 1905, from Blair & Company (for syndicate managers) \$7234.28 paid by Kessler & Company for subscription of \$40,000. of first mortgage 5% thirty year gold bonds of the Western Pacific Railway Company; together with assignment of same executed in blank by Kessler & Company.

6 certificates of the 4 per cent. preferred stock B of the Chicago, Great Western Railway Company

3274 numbered A 2435-A 2439 inclusive and 921 aggregating 548 shares.

The following documents affecting the real property known as 1018-1020 Bedford Avenue, Brooklyn, N. Y., described as follows: BEGINNING at a point on the westerly side of Bedford Avenue 237 feet southerly from the corner formed by the westerly side of Bedford and the Southerly side of DeKalb Avenues, running thence westerly 100 feet to a point distant 237 feet 8 inches southerly from the southerly side of DeKalb Avenue measured on a line drawn parallel with Bedford Avenue; running thence southerly parallel with Bedford Avenue 72 feet 9 inches, thence easterly parallel with DeKalb Avenue and part of the way through a party wall 100 feet to the Westerly side of Bedford Avenue, and thence northerly along the westerly side of Bedford Avenue 73 feet 5 inches to the place of beginning.

3275

Bond from Catherine I. MacKay and husband to Title Guarantee & Trust Company for \$10,000. dated and acknowledged June 16th, 1892, payable June 16th, 1893, with 5% interest.

Mortgage from the said Catherine I. MacKay and husband to the Title Guarantee & Trust Company of the same date, covering a part of the above described premises, recorded in Liber 2411 of Mortgages, page 431, in the Register's office of Kings County.

3276

Assignment of said bond and mortgage to William G. Vermilye dated July 9th, 1892, and recorded in said Register's office in Liber 2417 of Mortgages, page 423, July 13th, 1892.

Extension agreement of said bond and mortgage dated December 11th, 1897, between William G. Vermilye and Edward J. Halligan.

Assignment of said bond and mortgage from William G. Vermilye to Emma G. Lathrop dated

May 8th, 1899, and recorded in said office in Sec- 3277  
tion 7, Liber 20 of Mortgages, page 401.

Assignment dated February 19th, 1903, of said  
bond and mortgage from Emma G. Lathrop to  
Henry Kessler.

Deed William K. Gillett and Mary, his wife, to  
Henry Kessler, dated November 13th, 1905, and  
covering the premises above described, constituted  
an unlawful preference within the meaning of the  
Act of Congress known as the Bankruptcy Act, and  
said transfer is hereby set aside; and it is further

Ordered, adjudged and decreed that the owner-  
ship and right to possession of the said property  
and securities and also to certain notes of the Pitts- 3278  
burg, Westmoreland & Somerset Railroad Com-  
pany, which notes pursuant to an order of this court  
heretofore made herein were substituted in place of  
the coupons due between April 1st, 1908, and Oc-  
tober 1st, 1909 (both dates inclusive), and at-  
tached to the aforesaid bonds of said Railroad, is  
not in the defendants or either of them, wholly or  
in part, but is solely and exclusively in the com-  
plainant as trustee in bankruptcy as aforesaid;  
and it is further

Ordered, adjudged and decreed that the defend-  
ant Kessler & Company, Limited, its officers, em-  
ployees and agents, and the Hanover Safe Deposit 3279  
Company of No. 7 Nassau Street, New York City,  
the present custodian of said property and secur-  
ities, be and they each and all are hereby ordered  
within ten days after the service upon the Hanover  
Safe Deposit Company and upon the solicitors for  
the defendant Kessler & Company, Limited, of a  
copy of this decree, to deliver to Lawrence E. Sex-  
ton as trustee in bankruptcy as aforesaid, the com-  
plainant herein, the said notes of the Pittsburg,  
Westmoreland & Somerset Railroad, and the said  
property and securities and each and all thereof  
except such as are herein described as having been

3280 already disposed of pursuant to the order of this court, and also to deliver as aforesaid deed dated and acknowledged October 31st, 1907, from Henry Kessler of Manchester, England, and Gertrude Sophia, his wife, to Kessler & Company, Limited, of Manchester, England, and deed dated December 27th, 1907, executed by said Henry Kessler and wife in blank, covering the premises above described, and an assignment of the said mortgage executed in blank by said Henry Kessler and his wife.

And it appearing that during the pendency of this suit and pursuant to an order of this court herein, 3281 the said one hundred shares of preferred and seventy shares of common stock of the Standard Roller Bearing Company have been withdrawn from the custody of the said the Hanover Safe Deposit Company of New York, and delivered to third parties in consideration among other things of the sum of \$5600. which have been deposited, to abide the event of this suit, with the New York Trust Company to the joint order of the complainant, the defendant Kessler & Company, Limited, and Frank Youatt, as liquidator of said defendant; and it further appearing that, during the pendency of this suit and pursuant to an order of this court herein, 3282 the said \$12,000 par value of first mortgage bonds of the Indiana, Columbus and Eastern Traction Company have been withdrawn from the custody of the Hanover Safe Deposit Company of New York and sold and delivered to Drexel & Co. in consideration, among other things, of the sum of \$10,756.66. which have also been deposited in said Trust Company to the joint order of the same said persons to abide the event of this suit; and it further appearing that during the pendency of this suit and pursuant to an order herein, certain interest coupons attached to some of the bonds hereinbefore enumerated have been withdrawn from the custody of the

said Hanover Safe Deposit Company of New York <sup>3283</sup>  
and cashed, and the proceeds thereof deposited with  
said New York Trust Company to the joint order of  
the same said persons, which coupons and the pro-  
ceeds thereof are as follows:

Interest due December 1, 1907, on \$22,000 par value Muskogee Gas & Elec. Co. 5% bonds . . . . .	\$ 550.
Interest due June 1, 1908, on \$22,000 par value Muskogee Gas & Elec. Co. 5% bonds . . . . .	550.
Interest due April 1, 1908, on \$45,000 par value Orleans County Quarry Co. bonds. .	1350.
Interest due October 1, 1908, on \$45,000 par value Orleans County Quarry Co. bonds. .	1350. <sup>3284</sup>
Interest due May 1, 1908, on \$12,000 par value Indiana, Columbus & Eastern Trac- tion Co. 5% bonds . . . . .	300.
Interest due February 1, 1908, on \$56,000 par value United Breweries Co. 6% bonds	1680.
	<hr/> \$5780.

and it further appearing that during the pendency  
of this suit the following dividends have been re-  
ceived and deposited in said New York Trust Com-  
pany to the joint order of said same persons:

June 29th, 1908, dividend of 1½ cents per share on 10,000 shares Elkton Consoli- dated Mining & Milling Co. stock \$150, less 37 cents exchange . . . . .	\$149.63 <sup>3285</sup>
August 25th, 1908, dividend of 1½ cents per share on 10,000 shares Elkton Con- solidated Mining & Milling Co. stock \$150, less 37 cents exchange. . . . .	149.63
	<hr/> \$299.26

It is ordered, adjudged and decreed that the said  
monies so deposited as aforesaid in the said New

3286 **York Trust Company**, together with all interest accrued or to accrue thereon, are the sole property of the complainant herein as trustee in bankruptcy aforesaid, and the said New York Trust Co. is hereby ordered and directed within 10 days after the service upon it of a certified copy of this decree to honor checks drawn against the whole or any part of said monies by the complainant as trustee as aforesaid alone, without the signatures of either the defendant **Kessler & Company, Limited**, or **Frank Youatt** as liquidator of said defendant or any other person or persons. But it is further

3287 Ordered, adjudged and decreed that, as a further and cumulative relief to the complainant and without prejudice to any of the previous provisions of this decree, the defendant **Kessler & Company, Limited**, and **Frank Youatt**, its liquidator, within 10 days after the service upon the solicitors for said defendant of a copy of this decree, each sign and deliver to the complainant, as trustee as aforesaid, a check or checks upon the said New York Trust Company signed by the said **Kessler & Company, Limited**, and **Frank Youatt**, its liquidator, to the order of the complainant as trustee in bankruptcy as aforesaid for all the said monies so deposited as aforesaid with the said Trust Company together with all interest accrued or to accrue to the date of delivery of said check. And it is further

3288

Ordered, adjudged and decreed that the defendant **Kessler & Company, Limited**, and its servants and agents execute such deeds, bills of sale or other transfers as may be requisite properly to vest the title in the said complainant as trustee as aforesaid of such of the foregoing securities or property as may stand in the name of the said defendant or of any of its servants or agents, or as may be necessary to clear the title thereto in the said complainant as trustee as aforesaid; and it is further

Ordered, adjudged and decreed that **Lawrence E.**

Sexton as trustee as aforesaid, the complainant 3289  
 herein, have and recover of the defendants the costs  
 of this suit taxed at the sum of \$925.25 and one-  
 half of the fees of the master, the said one-half  
 amounting to the sum of \$1,250; making in all the  
 sum of \$2,175.25; and it is further

Ordered, adjudged and decreed that the inter-  
 vening petition or cross bill filed by J. & P. Coats,  
 Limited, be and the same is hereby dismissed upon  
 the merits.

C. M. HOUGH,

*D. J.*

(Endorsed)—Decree.—Filed December 4th, 1908. 3290

Please take notice that a decree, a copy of which  
 is annexed hereto, was this day filed and entered in  
 the office of the Clerk of the U. S. District Court,  
 Southern District of New York.

NEW YORK, December 4th, 1908.

Yours, etc.,

JOHN LARKIN,

Attorney for Complainant,  
 44 Wall Street, New York City.

To WM. D. GUTHRIE, Esq.,

Attorney for J. & P. Coats, Ltd.

3291

Messrs. McLAUGHLIN, RUSSELL, COE & SPRAGUE,  
 Solicitors for Kessler & Co., Ltd.

## 3292 DISTRICT COURT OF THE UNITED STATES,

## SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Kessler & Company and of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the said Kessler & Company, bankrupts,

Complainant, In Equity.

3293

vs.

KESSLER & COMPANY, LIMITED,  
and J. & P. Coats, Limited,  
intervenor,

Defendants.

3294

The defendant Kessler & Company, Limited, upon a petition by Frederick McLaughlin, Esq., one of its solicitors, verified November 23rd, 1907, obtained an order dated that day requiring Lawrence E. Sexton as receiver in bankruptcy of the above-named bankrupts to show cause why an order should not be made referring to a special commissioner the conflicting claims of the said Kessler & Company, Limited, and of Lawrence E. Sexton as Receiver of the said bankrupt, to certain securities set forth at length in the decree herein; which petition and order are hereto annexed. An order was thereafter made on November 26th, 1907, referring said conflicting claims to Peter B. Olney, Esq., as Special Master to hear and determine the same upon the merits, which order is hereto annexed. Thereafter on November 30, 1907, the said



Lawrence E. Sexton as such receiver in bank- 3295  
 ruptcy, and the said Kessler & Company, Limited,  
 appeared by their respective solicitors before said  
 Special Master and testimony was taken, and on  
 said day the said receiver in bankruptcy filed his  
 petition in the nature of a bill of complaint, which  
 petition is hereto annexed; and thereafter on De-  
 cember 10th, 1907, the said Kessler & Company,  
 Limited, filed its answer to said petition, by which  
 answer it expressly waived a plenary suit, which  
 answer is hereto annexed. Thereafter the said  
 Lawrence E. Sexton was elected and appointed  
 trustee in bankruptcy of said bankrupts, and an or-  
 der was duly made on February 7th, 1908, substi- 3296  
 tuting Lawrence E. Sexton as trustee of said bank-  
 rupts as complainant herein in the place and stead  
 of Lawrence E. Sexton as receiver in bankruptcy of  
 said bankrupts, which order is annexed hereto.  
 Thereafter J. & P. Coats, Limited, filed its petition,  
 verified February 27th, 1908, asking leave to inter-  
 vene herein and file a petition in the nature of a  
 cross-bill, and that the issues raised thereby be re-  
 ferred for hearing and determination to Peter B.  
 Olney, Esq., as Special Master, which said petition  
 is hereto annexed.

Thereafter, on March 30th, 1908, an or-  
 der was made granting to the said J. & P. Coats, 3297  
 Limited, leave to intervene and file a petition in the  
 nature of a cross bill, the allegations of which  
 should be deemed to be denied by the complainant,  
 Lawrence E. Sexton, as trustee as aforefaid, and re-  
 ferring the issues as thus raised to Peter B. Olney,  
 Esq., as Special Master to take proof and report  
 with his opinion, the said order being by the terms  
 thereof entered as of March 3rd, 1908, the date said  
 application was made; the said order is annexed  
 hereto.

On March 23rd, 1908, an order was duly  
 made upon consent of the complainant, of Kessler

3298 & Company, Limited, and of said J. & P. Coats, Limited, that this suit be deemed in all respects a suit brought in equity in the District Court of the United States for the Southern District of New York, by Lawrence E. Sexton, as trustee in bankruptcy as aforesaid, against Kessler & Company, Limited, in pursuance of the Bankruptcy Act, and be governed by all the law and rules of procedure relating thereto, and that the pleadings interposed be deemed the pleadings in said suit; which order also amends *nunc pro tunc* as of November 26th, 1907, the order of that date by making the reference to Peter B. Olney, Esq., one to him as Master  
 3299 in Chancery to take testimony and report with his opinion, which said order is hereto annexed.

Testimony was theretofore and thereafter taken by the respective parties before the said Master in Chancery, and afterwards was filed in the Clerk's office of the District Court with the report of the Master and his opinion thereon, which report and opinion were also filed with said Clerk, and were in favor of the complainant that the transfer of said securities should be set aside, and dismissing the cross bill of the said intervenor. Exceptions to said report and opinion of the Master were filed by intervenor on May 25, 1908, and by the defendant on  
 3300 June 3, 1908.

Afterwards and at the June, 1908, term of said court, present the Hon. Charles M. Hough, the said cause came on to be heard upon the pleadings, proof, report, opinion, and the exceptions thereto filed by the defendant and the intervenor, and was argued by counsel; and on the 4th day of December, 1908, a final decree of said court was filed and entered in favor of the complainant, by which it was adjudged that said cross bill of said intervenor J. & P. Coats, Limited, be dismissed upon the merits, and that said transfer of securities to the defendant Kessler & Company, Limited, be set aside and

that the same and the proceeds of a part thereof 3301  
be delivered up to the complainant, together with  
costs and one-half the Master's fees, the said final  
decree being annexed hereto.

And the costs having been taxed by the Clerk at  
\$925.25, the pleadings, decree, together with other  
papers filed in said cause, are duly annexed here-  
unto.

Wherefore let the said Lawrence E. Sexton  
as trustee in bankruptcy as aforesaid recover of  
said defendant Kessler & Company, Limited, the  
sum of \$925.25, costs, and \$1,250, one-half of the  
Master's fees, amounting in all to \$2,175.25, and let  
the said securities and the proceeds thereof be de- 3302  
livered up as adjudged in said final decree.

Signed and enrolled this 4th day of December,  
A. D. 1908.

THOMAS ALEXANDER,  
Clerk.

(Endorsed)—Final Record.—Filed Dec. 4th, 1908.

3304

At a Stated Term of the United States District Court for the Southern District of New York, held at the United States Post Office Building, Borough of Manhattan, City of New York, on the 14th day of December, 1908.

Present—Honorable CHARLES M. HOUGH,  
*District Judge.*

1305

LAWRENCE E. SEXTON, as  
Trustee in Bankruptcy of  
Alfred Kessler, Rudolf E. F.  
Flinsch and William K.  
Gillett, composing the firm  
of Kessler & Company, and  
the said KESSLER & COMPANY,  
Complainant,

AGAINST

KESSLER & Co., LIMITED, FRANK  
YOUATT, Liquidator, and J.  
& P. COATS, Intervenor,  
Defendants.

3306

A decree having been entered herein in equity on the 4th day of December, 1908, and application having been made by McLaughlin, Russell, Coe & Sprague, Solicitors for Kessler & Co., Limited, and Frank Youatt, Liquidator, for an order to be entered at the foot of said decree to define the disposition of the property and securities, the subject of this suit, mentioned in the bill of complaint herein, and in said decree pending the appeal to the Circuit Court of Appeals for the Second Circuit, from said decree about to be taken by Kessler & Co., Limited, and Frank Youatt, its Liquidator, defendants now, on motion of said McLaughlin,

Russell, Coe & Sprague, and after hearing John 3307  
 Larkin, Esq., solicitor and of counsel for Lawrence  
 E. Sexton, as Trustee in Bankruptcy aforesaid,  
 complainant herein, it is

Ordered that at the foot of said decree there be  
 entered the following, to wit:

It is hereby ordered, adjudged and decreed that  
 the property and securities mentioned in the  
 said bill of complaint and in said decree, which  
 are now in the vaults of the Hanover Safe Deposit  
 Company, of No. 7 Nassau Street, City, County  
 and State of New York, and Southern District of  
 New York, in a box in the name of Kessler & Co.,  
 Limited, shall be turned over by the defendants 3308  
 Kessler & Co., Limited, and Frank Youatt,  
 Liquidator, to Lawrence E. Sexton, the complain-  
 ant as Trustee in Bankruptcy of the above-named  
 bankrupts, to be held by him as an officer of this  
 Court, and to be kept by him in a box in his name  
 as such Trustee and as officer of this Court, in the  
 said Hanover Safe Deposit Company, or such other  
 safe deposit company in the said County and State  
 of New York, and Southern District of New York,  
 as may be agreed upon in writing by the said com-  
 plainant and said defendants, there to remain dur-  
 ing the pendency of said appeal, and that said prop-  
 erty and securities shall not be removed therefrom 3309  
 or disposed of by said Lawrence E. Sexton, as such  
 trustee and as officer of this Court, except upon  
 order of this Court made after notice, or upon the  
 written consent of Kessler & Co., Limited, and  
 Frank Youatt, its Liquidator, or their solicitors,  
 McLaughlin, Russell, Coe & Sprague, and it is

Further ordered, adjudged and decreed that  
 said complainant, Lawrence E. Sexton, as Trustee  
 aforesaid as an officer of this Court, may collect  
 dividends, coupons, rents and interest accruing on  
 said property and securities, and that, if at any  
 time it be agreed by consent in writing of the com-

3310 plainant and said defendants, or their respective solicitors or be directed by order of this Court upon notice that any of said property and securities shall be sold or realized upon from time to time, the proceeds of such sales and the realizations therefrom in cash, together with all dividends, coupons, rents and interest which may be collected on said property and securities as the same shall accrue, pending said appeal, shall be deposited by the complainant as Trustee aforesaid and as an officer of this Court, in the New York Trust Company in the City, County and State of New York and Southern District of New York, one of the designated depositories of this Court, there to remain during the pendency of said appeal, and not to be withdrawn by said complainant as Trustee aforesaid and as officer of this Court except upon order of this Court upon notice or the consent in writing of said Kessler & Co., Limited, Frank Youatt, the Liquidator, or McLaughlin, Russell, Coe & Sprague, their solicitors, and it is

Further ordered, adjudged and decreed that the moneys mentioned in said decree as being now on deposit in said New York Trust Company to the joint credit of Lawrence E. Sexton, as Trustee aforesaid or officer of this Court, Kessler & Co., Limited, and Frank Youatt, the Liquidator, shall be turned over by the defendants Kessler & Co., Limited, and Frank Youatt, its Liquidator, to the complainant, Lawrence E. Sexton, as Trustee aforesaid as officer of this Court, and shall remain on deposit in his name as such officer in said New York Trust Company pending the appeal, and shall not, pending the appeal herein, be withdrawn from said Trust Company by said Lawrence E. Sexton as Trustee aforesaid as officer of this Court, unless by order of this Court upon notice or by written consent of Kessler & Co., Limited, and Frank

Youatt, its Liquidator, or McLaughlin, Russell, 3313  
Coe & Sprague, their solicitors.

C. M. HOUGH,  
D. J.

(Endorsed)—Order at foot of Decree of Dec. 4th,  
'08.—Filed Dec. 14, 1908.

# UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

3314

LAWRENCE E. SEXTON, as  
Trustee in Bankruptcy of  
Alfred Kessler, Rudolf E. F.  
Flinsch and William K.  
Gillett, composing the firm  
of Kessler & Company, and  
the said KESSLER & COMPANY,  
Complainant,

AGAINST

KESSLER & Co., LIMITED, FRANK  
YOUATT, Liquidator, and J.  
& P. COATS, LIMITED, In-  
tervenor,  
Defendants.

3315

## PETITION FOR APPEAL.

The above named defendants, Kessler & Com-  
pany, Limited, and Frank Youatt, Liquidator  
thereof, conceiving themselves aggrieved by  
the decree made and entered by the above  
named Court in the above entitled cause on

3316 the 4th day of December, 1908, do hereby  
appeal from said decree to the United States  
Circuit Court of Appeals of the Second Circuit for  
the reasons specified in the assignment of errors  
which is filed herewith. And the above named in-  
tervenor and defendant J. & P. Coats, Limited,  
having as appears by its waiver hereto annexed,  
declined to join in the appeal and waived and re-  
nounced its rights of appeal herein and consented  
to a severance, the said Kessler & Company,  
Limited, and Frank Youatt, Liquidator, pray that  
they be allowed this appeal and that their interests  
be severed in this appeal from the said J. & P.  
3317 Coats, Limited, and that a transcript of the record  
papers and proceedings upon which said decree  
was made, duly authenticated, may be sent to the  
United States Circuit Court of Appeals of the  
Second Circuit.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,  
Solicitors for Defendants,  
Kessler & Company, Ltd., and  
Frank Youatt, Liquidator,  
thereof.



UNITED STATES DISTRICT COURT, 3319  
SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as  
Trustee in Bankruptcy of  
Alfred Kessler, Rudolf E.  
F. Flinsch and William  
K. Gillett, composing the  
firm of Kessler & Com-  
pany, and of the said  
KESSLER & COMPANY,  
Complainant,

AGAINST

KESSLER & Co., LIMITED,  
Frank Youatt, Liquidator,  
and J. & P. COATS, LIM-  
ITED, Intervenor,  
Defendants.

Renunciation of  
Right to Appeal  
and Consent  
to Severance. 3320

J. & P. Coats, Limited, appearing herein and  
waiving the issuance and service of a summons  
and severance, or notice to join in appeal, hereby  
renounces its right to appeal from the decree  
made and entered herein on or about the 4th day 3321  
of December, 1908, and declines to join in the ap-  
peal from said decree by Kessler & Co., Limited,  
Frank Youatt, Liquidator, defendants, and con-  
sents that an order may be made herein, without  
further notice, allowing the defendants, Kessler  
& Co., Limited, and Frank Youatt, Liquidator, to  
appeal separately and apart from J. & P. Coats,  
Limited, intervenor and defendant, and that the  
appeal may be severed in that respect.

Dated NEW YORK, December 9, 1908.

J. & P. COATS, LTD.,

By Spool Cotton Co., Agents,  
Theodore Freylinghausen, Treas.

(Endorsed)—Petition for Appeal.—Filed Dec.

14, '08.

3322

## UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as  
Trustee in Bankruptcy of  
Alfred Kessler, Rudolf  
K. Gillett, composing the  
firm of Kessler & Com-  
pany, and of the said  
KESSLER & COMPANY,  
Complainant,

3323

AGAINST

KESSLER & COMPANY, LIM-  
ITED, Frank Youatt, Liqui-  
dator, and J. & P. COATES,  
LIMITED, Intervenor,  
Defendants.

In Equity.

## ASSIGNMENT OF ERRORS.

3324

And now comes the defendants Kessler & Com-  
pany, Limited, and Frank Youatt, Liquidator  
thereof, and file the following assignment of errors  
upon which they will rely on this appeal from the  
decree in equity entered herein on December 4,  
1908.

FIRST.—That the District Court of the United  
States for the Southern District of New York  
erred in overruling each and all of the respective  
exceptions filed herein by the defendant Kessler  
& Company, Limited, to the report of Peter B.  
Olney, Master, and in confirming the report herein  
of said Peter B. Olney, Master.

SECOND.—That the said Court erred in granting judgement to the complainant as prayed for in his bill of complaint. 3325

THIRD.—That the said Court erred in adjudging and decreeing that there was a transfer on or about the 25th day of October, 1908, by the bankrupts, Kessler & Company, to the defendant, Kessler & Company, Limited, of the property and securities set forth in the decree herein, and that said transfer constituted an unlawful preference within the meaning of the Act of Congress known as the Bankruptcy Act, and in setting aside said transfer. 3326

FOURTH.—That the said Court erred in adjudging and decreeing that the ownership and right of possession of the said property and securities mentioned in said decree, were and are not in the defendant, Kessler & Company, Limited, wholly or in part, but were and are solely and exclusively in the complainant as Trustee in Bankruptcy, as aforesaid.

FIFTH.—That the said Court erred in ordering the defendant, Kessler & Company, Limited, its officers, employees and agents and the Hanover Safe Deposit Company of No. 7 Nassau Street, New York City, within ten days after service on said Hanover Safe Deposit Company and upon the solicitors for the said Kessler & Company, Limited, of a copy of the decree to deliver to the complainant Lawrence E. Sexton as Trustee in Bankruptcy, aforesaid, the property, securities and deeds mentioned in said decree. 3327

SIXTH.—That the said Court erred in ordering the New York Trust Company within ten days after the service of a copy of the decree to honor checks against funds deposited in said New York

- 3328 Trust Company to the credit of Lawrence E. Sexton, as Trustee in Bankruptcy aforesaid, the complainant, and Kessler & Company, Limited, the defendant, and Frank Youatt, Liquidator of said defendant, drawn by the complainant, Lawrence E. Sexton as Trustee aforesaid, alone.

SEVENTH.—That the said Court erred in ordering the defendant Kessler & Company, Limited, and Frank Youatt, its liquidator, within ten days after the service upon the solicitors for said defendant of a copy of said decree to sign and deliver to the complainant as trustee in Bankruptcy, aforesaid, a check or checks on the said New York Trust Company signed by the said Kessler & Company, Limited, and Frank Youatt, its Liquidator, to the order of the complainant as Trustee in Bankruptcy aforesaid for all moneys deposited as aforesaid with the said New York Trust Company, and interest thereon.

EIGHTH.—That the said Court erred in ordering that the defendant Kessler & Company, Limited, and its servants and agents execute such deeds, bills of sale or other transfers as may be requisite to vest title in the complainant as Trustee in Bankruptcy aforesaid, and such of the securities and property mentioned in said decree as stand in the name of defendant or any of its servants or agents, or such as may be necessary to clear the title thereto in said complainant as Trustee in Bankruptcy aforesaid.

NINTH.—That the said Court erred in not dismissing the bill of complaint.

TENTH.—That the said Court erred in not holding and deciding that there was a transfer of the property and the securities set forth in the bill of complaint and in the decree to the defendant

Kessler & Company, Limited, by the said bank-<sup>3331</sup>  
rupts at a date more than four months before the  
filing of the petition in bankruptcy against said  
bankrupts valid against the complainant as Trust-  
tee of said bankrupts.

ELEVENTH.—That the said Court erred in hold-  
ing and deciding that the right, title and interest of  
the defendant, Kessler & Company, Limited, to the  
property and securities mentioned in said decree  
came first into existence on October 25th, 1907.

TWELFTH.—That the said Court erred in not  
holding and deciding that the defendant, Kessler<sup>3332</sup>  
& Company, Limited, had an equitable lien on the  
property and securities mentioned in the bill of  
complaint and in said decree valid against the  
complainant as Trustee in Bankruptcy.

THIRTEENTH.—That the said Court erred in not  
holding and deciding that the delivery of physical  
possession of the property and securities mention-  
ed in the bill of complaint and in the said decree  
by the said bankrupts to the defendant, Kessler &  
Company, Limited, on the 25th day of October,  
1907, was in accordance with a valid contract made  
at a time prior to four months before the filing of  
the petition in bankruptcy against the bankrupts<sup>3333</sup>  
and in not finding that said contract was valid and  
effective against the complainant as trustee of said  
bankrupts.

FOURTEENTH.—That the said Court erred in  
holding and deciding that the bankrupts did not  
make any particular property or fund security  
for the debt or obligation by virtue of which the  
defendant, Kessler & Company, Limited, seeks to  
hold the property and securities mentioned in the  
bill of complaint and in said decree, physical pos-  
session of which was given to it on October 25th,

3334 1907, and in holding and deciding that the bankrupts did not agree to keep on hand particular, specified property as security for the debt due to the defendant, Kessler & Company, Limited.

FIFTEENTH.—That the said Court erred in holding and deciding that the agreement and contract between the bankrupts and the defendant, Kessler & Company, Limited, and the course of conduct of the parties thereunder, as appears in the record, did not create an equitable lien in favor of the defendant, Kessler & Company, Limited, on the property and securities mentioned in the bill of complaint  
3335 and in said decree valid and effective against complainant as trustee in bankruptcy aforesaid.

SIXTEENTH.—That the said Court erred in failing to hold and decide that there was prior to the four months next preceding the filing of the petition in bankruptcy herein, a *bona fide* engagement by the said bankrupts with the defendant, Kessler & Company, Limited, to convey specific property amounting to an equitable lien valid against the complainant as Trustee in Bankruptcy.

SEVENTEENTH.—That the Court held in holding and deciding that on October 25th, 1907, Kessler  
3336 & Company, was insolvent within the definition of the Bankruptcy Act.

EIGHTEENTH.—That the said Court erred in holding and deciding there was a transfer by the bankrupts of the property and securities mentioned in said decree to the defendant Kessler & Company, Limited, on the 25th day of October, 1907, and that at that time the defendant Kessler & Company, Limited, or its agents had reasonable cause to believe that a preference was intended.

NINETEENTH.—That said Court erred in failing to hold and decide that there was an express ex-

ecutory agreement in writing between Kessler & <sup>3337</sup> Company, of New York, the bankrupts, and the defendant Kessler & Company, Limited, and made prior to four months next preceding the filing of the petition in bankruptcy against said bankrupts (whereby Kessler & Company, of New York, sufficiently indicated an intention to make the particular property described in said agreement a security for the debt or other obligation of the bankrupts to the defendant, Kessler & Company, Limited (enforceable against the complainant as trustee in bankruptcy of said bankrupt.

TWENTIETH.—That the said Court erred in not holding and deciding that the defendant Kessler <sup>3338</sup> & Company, Limited, had a right, title and interest in or to the property and securities mentioned in the bill of complaint and in said decree, existing before the 25th of October, 1907, not obnoxious to the Bankruptcy Act nor destroyed by the adjudication in bankruptcy of said bankrupts, and valid against the complainant as trustee in bankruptcy.

TWENTY-FIRST.—That the said Court erred in holding and deciding that the agreements between the said bankrupts and the defendant Kessler & Company, Limited, set forth in the record in relation to the property and securities mentioned in the bill of complaint and in the decree did not <sup>3339</sup> confer any present rights at the time of making said agreements in Kessler & Company, Limited, enforceable at law.

TWENTY-SECOND.—That the said Court erred in holding and deciding that the said bankrupts did not at a time more than four months prior to the filing of the petition in bankruptcy part with the title to the property and securities mentioned in the bill of complaint and in the said decree to the defendant Kessler & Company, Limited, or make a valid contract so to do in future.

3340 TWENTY-THIRD.—That the said Court erred in holding and deciding that equity will not enforce as against the complainant as Trustee in Bankruptcy, the agreement disclosed by the record between the bankrupt aforesaid and the defendant Kessler & Company, Limited.

3341 TWENTY-FOURTH.—That the said Court erred in not holding and deciding that the legal or equitable property in the securities mentioned in the bill of complaint and in said decree passed to the defendant Kessler & Company, Limited, prior to the filing of the petition in bankruptcy against the said bankrupts, and that there is no express law invalidating the transfer on the facts disclosed in the record.

TWENTY-FIFTH.—That the said Court erred in holding that the complainant was entitled to recover any costs herein from the defendant Kessler & Company, Limited.

3342 TWENTY-SIXTH.—That the said Court erred in adjudging and decreeing that the complainant recover of the defendant one-half of the fees of the Master in Chancery amounting to Twelve Hundred and Fifty Dollars (\$1,250).

WHEREFORE the defendant Kessler & Company, Limited, and Frank Youatt, liquidator thereof, pray that the decree may be reversed and that said Court may be directed to dismiss the bill of complaint herein.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,  
Solicitors for Defendants, Kessler &  
Company, Limited, and Frank  
Youatt, Liquidator thereof.

Endorsed.—Assignment of Errors.—Filed Dec. 14, 1908.



## UNITED STATES DISTRICT COURT,

3343

SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company, and of the said Kessler & Company,  
Complainant,

AGAINST

KESSLER & COMPANY, LIMITED,  
FRANK YOUATT, Liquidator,  
and J. & P. COATS, LIMITED,  
Intervenor,  
Defendants.

Order Allowing  
Appeal, Severance and Su- 3344  
persedeas.

The defendants, Kessler & Company, Limited, and Frank Youatt, Liquidator, thereof, having heretofore filed herein their petition for an appeal and for a severance of interests in this appeal from the intervenor defendant J. & P. Coats, Limited, and it appearing by the written waiver and renunciation of said J. & P. Coats, Limited, that it has declined to join in said appeal, and has renounced its right of appeal herein, and consented that the interests of Kessler & Company, Limited, and Frank Youatt, Liquidator thereof, be severed in this appeal, and the defendants, Kessler & Company, Limited, and Frank Youatt, Liquidator, having filed an assignment of errors, said appeal is hereby allowed to the petitioners Kessler & Company, Limited, and Frank Youatt, Liquidator, and

3345

3346 their interests in said appeal are hereby severed from those of said J. & P. Coats, Limited.

Said appeal is to operate as a supersedeas of the decree herein of December 4th, 1908, and a stay of execution of said decree pending such appeal as to the defendants Kessler & Company, Limited, and Frank Youatt, Liquidator, only, but is not to affect compliance with a certain order entered at the foot of said decree on the 14th day of December, 1908, upon the execution of a bond in the penalty of \$5,000.

The American Surety Company, of New York, is accepted as surety on said bond, and said bond  
3347 is now approved.

December 14, 1908.

C. M. HOUGH,  
D. J.

(Endorsed)—Order allowing Appeal, Severance and Supersedeas.—Filed Dec. 14, '08.

3348

## DISTRICT COURT OF THE UNITED STATES 3349

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillette, composing the firm of Kessler & Company, and of the said Kessler & Company,  
Complainant,

AGAINST

KESSLER & COMPANY, LIMITED,  
FRANK YOUATT, Liquidator,  
and J. & P. COATS, LIMITED.  
Intervenor,  
Defendants.

In Equity.

3350

Know all Men by These Presents, That we, Kessler & Company, Limited, and Frank Youatt, the above named defendants and the American Surety Company, of New York, are held and firmly bound 3351  
unto the above named plaintiff and complainant, Lawrence E. Sexton, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillette, composing the firm of Kessler & Company, and of the said Kessler & Company in the sum of Five thousand dollars (\$5,000), to be paid to the complainant for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 12th day of

3352 December, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Kessler & Company, Limited, and Frank Youatt have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Judicial Circuit to reverse the decree rendered in the above entitled suit by the Hon. Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, on December 4th, 1908.

Now, therefore, the condition of this obligation is such, That if the above named Kessler & Company, Limited, and Frank Youatt shall prosecute  
3353 the said appeal to effect, and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Signed and delivered, taken and acknowledged, this 12th day of December, 1908, before me.

KESSLER & Co., LTD. [L. S.]

KESSLER & Co., LTD. [L. S.]

FRANK YOUATT, Liquidator,

By RUFUS W. SPRAGUE, JR.,

Attorney in fact.

3354 AMERICAN SURETY COMPANY, OF NEW YORK.

Attest:

H. H. SIMPSON,

[L. S.] Resident Asst. Secretary.

RICHARD DEMING,

Resident Vice-President.

STATE OF NEW YORK, }  
County of New York. }

On this 12th day of December, 1908, before me personally came Rufus W. Sprague, Jr., the attorney in fact of the Kessler & Company, Limited, and Frank Youatt, to me known to be the individuals

described in, and who as such attorney, executed 3355  
the foregoing instrument and acknowledged that he  
executed the same as the act and deed of said Kessler & Company, Limited, and Frank Youatt, therein  
described, and for the purposes therein mentioned.

KESSLER & Co., LTD. [L. S.]

KESSLER & Co., LTD. [L. S.]

FRANK YOUATT, Liquidator,

By RUFUS W. SPRAGUE, JR.,

[NOTARY'S SEAL]

ROBERT P. SMITH,

Notary Public,

Westchester County.

Cert. filed in N. Y. Co. 3356

(Endorsed) — Bond on Appeal.—Approved, New  
York, Dec. 14th, '08. C. M. Hough, D. J.—  
Filed Dec. 14th, 1908.

STATE OF NEW YORK, {  
County of New York, { ss.:

On this 15th day of Dec., 1908, before me personally appeared Richard Deming, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and says: that he resides in Ossining, New York; that he is the Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Richard Deming further said that he is acquainted with H. H. Simpson, and knows him to be one of the Resident 3357

- 3358 Assistant Secretaries of said Corporation; that the signature of said H. H. Simpson subscribed to the said instrument, is in the genuine handwriting of the said H. H. Simpson, and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Richard Deming, Resident Vice-President.

JARED F. HARRISON, JR.,

Notary Public.

[L. S.]

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

3359

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of ALFRED KESSLER, RUDOLF E. F. FLINSCH and WILLIAM K. GILLETT, composing the firm of KESSLER & COMPANY, and of the said KESSLER & COMPANY,

Complainant,

AGAINST

3360 KESSLER & COMPANY, LIMITED, FRANK YOUATT, Liquidator, and J. & P. COATS, LIMITED, Intervenor,

Defendants.

Citation on Appeal.

United States of America, ss:

To Lawrence E. Sexton, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company, and of the said Kessler & Company,

You are hereby cited and adminished to be and <sup>3361</sup>  
 appear before the United States Circuit Court of  
 Appeals for the Second Circuit, to be holden at the  
 Borough of Manhattan, in the City of New York,  
 in the District and Circuit above named, on the  
 11th day of January, 1909, pursuant to an appeal  
 filed in the Clerk's Office of the District Court of  
 the United States for the Southern District of New  
 York, in Equity, wherein Kessler & Company,  
 Limited, and Frank Youatt, its liquidator, defend-  
 ants-appellants and you are complainant-appellee  
 to show cause, if any there be, why the decree in  
 said appeal mentioned should not be reversed, modi-  
 fied or corrected, and speedy justice should not be <sup>3362</sup>  
 done in that behalf.

Given under my hand at the Court House in the  
 Borough of Manhattan, City of New York, in the  
 Southern District of New York, this 14 day of  
 December, in the year of Our Lord, One Thousand  
 Nine hundred and Eight, and of the Independence  
 of these United States the one hundred and thirty-  
 third.

C. M. HUGH,

District Judge of the United States  
 For the Southern District of New York

(Endorsed)—Citation on Appeal.—Filed Dec. 14. <sup>3363</sup>  
 1908.

I hereby admit service of a true copy of the  
 within citation on appeal.

Dated City of New York, N. Y., December 16th,  
 1908.

JOHN LARKIN,  
 Solicitor for Lawrence E. Sexton,  
 as Trustee in Bankruptcy, etc.,  
 Complainant,  
 No. 44 Wall Street,  
 New York City, N. Y.

3364

SEXTON, Trustee,

VS.

KESSLER & Co., LTD., *et al.*

The within are true copies of the testimony, exhibits, pleadings, court orders, etc., comprising the entire record on appeal herein.

Jan. 15/09.

3365

McLAUGHLIN, RUSSELL, COE & SPRAGUE,  
Solicitors for Defendants-Appellants.JOHN LARKIN,  
Solicitor for Complainant-Respondent.

UNITED STATES OF AMERICA,  
Southern District of New York, } ss. :

3366

LAWRENCE E. SEXTON, a Trustee in Bankruptcy of Alfred Kessler *et al.*, comprising the firm of KESSLER & Co., Bankrupts,  
Complainants,

AGAINST

KESSLER & Co., LIMITED, FRANK YOUATT, Liquidator, and J. & P. COATES, LIMITED, Intervenor,  
Defendants.

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America for the



Southern District of New York, do hereby Certify 3367  
that the foregoing is a correct transcript of the  
record of the District Court in the above-entitled  
cause.

In testimony whereof, I have caused the seal of  
the said Court to be hereunto affixed, at the City of  
New York, in the Southern District of New York,  
this 19 day of Jany. in the year of our Lord one  
thousand nine hundred and nine, and of the Inde-  
pendence of the said United States the one hundred  
and thirty-third.

THOS. ALEXANDER,  
Clerk.

[SEAL]

3368

UNITED STATES CIRCUIT COURT OF  
APPEALS,

SECOND CIRCUIT.

LAWRENCE E. SEXTON, as Trus-  
tee in Bankruptcy, etc.,  
Complainant-Appellee,

AGAINST

KESSLER & Co., LTD., and FRANK  
YOUATT, Liquidator,  
Defendants-Appellants.

3369

It is hereby stipulated as follows:

1. That the following pages of the certified  
record on appeal from the District Court herein be  
not printed, viz. : 42, 652 to 655, inclusive, 802, 803,  
814, 902, 1160, 1210, 1267 and 1278.

2. That of pages 979 to 1159, inclusive, of the said  
certified record on appeal the parts struck out in

3370 ink or pencil be not printed and at the beginning of the Exhibits contained in said pages on page 979, or immediately before the first of the Exhibits included within the pages just mentioned, there be printed the following statement: "From the following letters have been omitted passages containing items of family or personal news and general gossip."

3371 3. That complainant's Exhibit 74 (a) comprising pages 1304 to 1362, inclusive, of the record as certified from the District Court, and consisting of the Schedules in bankruptcy of the firm of Kessler & Co. be not printed in full, but that only page 1363 thereof, being the summary of assets and liabilities attached to said schedules, be printed, and also the following as a statement of the remainder of said exhibit as applicable to this suit:

Schedule A-2 shows creditors holding securities, and contains the names of the following secured creditors: National Park Bank, Merchants' National Bank, Central Trust Company, J. P. Morgan & Co., Glyn, Mills, Currie & Co., Lloyds Bank, Limited; Cunliffe Bros., National City Bank, Louis Dreyfus & Co., A. Ruffer & Sons, Von Willer & Co., Kessler & Co., Limited; Len & Co., Inc.; Basler Handelsbank, Bank Fur Handel & Industrie,  
3372 Deichmann & Co.

Said schedule A-2 contains a list of the said securities so held by the respective creditors and those securities opposite the name of the defendant Kessler & Co., Ltd., are the same securities as are in litigation in this suit. The indebtedness there listed to Kessler & Co., Ltd., is \$377,815.73, and the alleged value of the said securities is \$495,584.28, exclusive of two lots of securities which are not valued.

4. That pages 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377 and

1378 of the record as certified from the District 3373 Court, which cover Complainant's Exhibits 74 to 88, inclusive, which exhibits are pages 44 to 52 of Kessler & Co., the bankrupts' debit journal, and pages 40 to 45 of their credit journal, both for October 25, 26, 27, 28, 29 and 30, 1907, be not printed in full, but that instead thereof the following be taken as a summary of said exhibits as applicable to this suit:

These exhibits 74 to 88, inclusive, contain a statement of the business done by the bankrupts from October 25th, 1907, to October 30th, 1907, and show a loss of about \$500. in the assets of Kessler & Co., the bankrupts, between October 25th, 1907, 3374 and October 30th, 1907, as a result of the business.

Dated New York, February 2, 1909.

JOHN LARKIN,

Solicitor for Complainant-Appellee.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,

Solicitors for Defendants-Appellants.

So ordered.

E. H. LACOMBE,

*U. S. C. J.*

United States Circuit Court of Appeals for the Second Circuit.

No. 263, October Term, 1908.

Argued March 23, 1909; Decided May 14, 1909.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, etc., Complainant-Appellee,

vs.

KESSLER & COMPANY, LTD; FRANK YOUATT, Liquidator, Defendants-Appellants,  
and

J. & P. COATS, LTD., Intervenor, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges.

WARD, *Circuit Judge*:

Kessler & Company, of New York, engaged in the business of banking and foreign exchange, had for a long time drawn upon Kessler & Co., Ltd., of Manchester, without giving any security for payment of its drafts. Early in 1903 the Manchester house wrote the New York house as follows:

"We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30 of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

"We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for."

In accordance with this letter the New York house on June 30 wrote the Manchester house:

"In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe deposit vaults the following securities, package marked 'Escrow for account of Kessler & Co., Limited, Manchester':

1484 shares Oklahoma Gas & Electric Co., at 25.....	\$37,100
2428 shares United Lighting & Heating Co., at 12.....	29,136
2352 shares Daimler Manufacturing Company, at 50....	117,600
\$373,000 United Breweries Co. first 6's, at 65.....	242,245

\$406,081

This escrow is intended as a protection against our long drawings against your good selves."

July 8 the Manchester house replied as follows:

"We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality."

December 23, 1903, the Manchester house wrote to the New York house as follows:

"For the purpose of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st December.

We do not think the matter will present any difficulty for you. Something in the form of the enclosed is what we require. \* \* \*

We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities.

Names, secs. and market value."

The New York house not only conformed to these directions but in addition entered the securities so set aside and all substitutions of them on their loan book and notified the Manchester house of substitutions made from time to time. The securities were always either negotiable by delivery or endorsed in blank. The two houses did business in strict conformity with the foregoing arrangement until the fall of 1907 when a financial panic occurred in the City of New York.

October 25 the stability of the New York house being in doubt it delivered to an agent of the Manchester house then in New York City the escrow securities, which he deposited in a safe deposit company in the name of the Manchester house.

November 8 a petition in bankruptcy was filed against the New York house and November 27 it was adjudicated a bankrupt. This is an action in equity brought by the trustee in bankruptcy to set aside the transfer of the securities because made within four months prior to the filing of the petition, the New York house being insolvent and the Manchester house knowing or having reason to know that fact and the intention being to give it a preference. The matter was referred to a master who found in accordance with the prayer of the bill and his report was confirmed by the District Judge from whose decree this appeal is taken.

The master and the District Judge both held the transaction in question to be a pledge or an agreement to pledge the escrow securities and that the delivery of them under the circumstances stated in the bill within four months of the filing of the petition in bankruptcy constituted a voidable preference under the Bankrupt Act.

It may be admitted that the conclusion so reached was entirely right if the arrangement is to be regarded as a pledge or a promise to pledge, possession being essential to the existence of a pledge. This relieves us from the necessity of examining authorities relating to pledges. A word, however, may be said as to the cases of *Casey v. Cararoc*, 96 U. S. 467; *Casey v. National Bank*, *id.* 492 and *Casey v. Schuchardt*, *id.* 494, upon which the appellant especially relies. In the second case a receipt was given by the bank which might have been treated as a declaration of trust, but the defendant relied on its rights as a pledge. What Mr. Justice Bradley said in the last case was undoubtedly true of all the cases, "As the only claim made by Schuchardt & Sons in their answer to the securities in question is by way of pledge and as there was no such delivery and retention of possession by them or their agents or trustees as the law requires to constitute the privilege of a pledge as to third persons, their claim cannot be sustained."

The intention to secure is plain, but this could have been accomplished not only by a pledge, which is the usual course of business in case of choses in action but by a mortgage or by a trust. It can hardly be doubted that a formally executed declaration of trust as to specific securities by the New York house in favor of the Manchester house would have been good. The New York house although the maker of the trust, could have properly acted as the trustee, *Locke v. Trust Co.*, 140 N. Y. 135, to the extent of the trust, viz. the protection of the Manchester house for its acceptances.

As the transaction was a perfectly honest one, a construction should be adopted to give it effect, if that is possible. In their correspondence the parties used neither the words mortgage, nor pledge nor trust, but the inapt word escrow, which they probably did not understand. What they did, however, clearly evidences their intention. The credit to be given to the New York house was not to depend alone upon its strength but also upon additional security to be given to the Manchester house. The New York house being the absolute owner of certain specified securities agreed in accordance with the requirement of the Manchester house to hold them for its account and to that end both segregated them from their other securities and entered them upon their books as so appropriated. The Manchester house as the equitable owners authorized the New York house to withdraw the specified securities from time to time for their own purposes not absolutely, but upon condition that they should substitute securities of equal value, which was always done. There were accordingly, during the whole period of this credit, specified earmarks or traceable securities held by the New York house for account of the Manchester house. The use of the word collateral does not necessarily indicate a pledge. It is important only as showing that the Manchester house's ownership of or interest in the securities was only for the purpose of protecting it for accepting the drafts of the New York house.

Considering the family relation and the long business dealing between the two houses and the fact that they were dealing three thousand miles apart and that they had entire confidence in each

other, the arrangement made was natural and reasonable. It was sufficiently precise to protect the Manchester house and elastic enough to meet the ordinary requirements of the business of the New York house.

If the transaction had been a mortgage of the securities the delivery of them October 25, 1907, would have been good as against the trustee in bankruptcy because under the law of the State of New York mortgages of choses in action need not be filed, Lien Law Sec. 90; *Humphrey v. Tutman*, 198 U. S. 91. Doubtless a court of equity would not intervene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor, but no such assistance would have been needed, the mortgagor having voluntarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagee, *Hauselt v. Harrison*, 105 U. S. 401; *Wood v. U. S. Fidelity Co.*, 143 F. R. 424.

So in the case of trust receipts the courts of New York have been astute to carry out the intention of the parties. The course of business is as follows: A banker gives a letter of credit to the purchaser of goods to enable him to pay for them upon condition that bills of lading to the banker's order for the goods shall be delivered to him, accompanied by a draft upon the purchaser. Upon arrival of the goods the banker delivers the bill of lading to the borrower, he executing a trust receipt to hold or sell the goods as the property of the banker for his benefit. Without defining exactly what the relation between the lender and the borrower is as to the goods, that is, whether it is that of mortgagor and mortgagee or of pledgor and pledgee, or a conditional sale, the courts have steadily protected the right of the lender in the goods so delivered, *Farmers Mechanics Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32; *Dreel v. Pease*, 133 N. Y. 129.

We regard the transaction in question as a declaration of trust in respect to the escrow securities by the New York house in favor of the Manchester house. Being the absolute owner of the securities, it declared in consideration of its right to draw that it held and would hold the same and all securities subsequently substituted therefor for the benefit of the Manchester house. From that moment the legal title was in the New York house, but the equitable in the Manchester house, the New York house holding the securities in a fiduciary capacity. This was the condition on which the Manchester house gave the drawing credit which continued for several years and it was because of its ownership that its authority to substitute securities was needed and was given.

We do not apprehend that this conclusion will result in the consequences foretold by the appellee. The public was not giving credit to the New York house on the strength of its apparent ownership of these securities because it knew nothing at all about them. The visible possession of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors. Yet ownership of

chattels where there has been no change of possession will be protected if they are set apart and marked and in this way notice given to the public. *First National Bank v. Pennsylvania Trust Co.*, 124 *F. R.* 968. There was, however, as to the securities under consideration no secrecy which was not inherent in their nature. The public does not know what stocks, bonds or notes a merchant has, and therefore does not give him credit because of them. There is no evidence that any exhibition of or statement as to these securities was made to anyone by the New York house for the purpose of obtaining credit. Their books if examined would have shown what the real dealing between them and the Manchester house was.

If there had been no insolvency and the New York house had withdrawn securities without substituting others a court of equity would have compelled it to do so, or at least would have enjoined it from making such withdrawals, at the suit of the Manchester house. If having failed to cover its drafts, the New York house had refused to deliver the securities to the Manchester house, a court of equity would have compelled it to do so. In delivering the securities to the Manchester house October 25, 1907, the New York house acted without the compulsion of a court of equity in strict accordance with the trust it had declared four years before, when entirely solvent. For the first time in that course of dealing there was an expectation that the New York house would not cover its drafts; that the Manchester house would have to pay them and would need to realize upon the securities which the New York house held for its protection. No new right or privilege was then created voidable under the Bankrupt Act. The delivery of these earmarked securities was in strict pursuance of the agreement made long before on the strength of which the credit was given. *Sabin v. Camp*, 98 *F. R.* 974, cited with approval in *Thompson v. Fairbanks*, 196 *U. S.* 516, 524. A liberal construction should be given to these transactions in aid of the obvious intention of the parties.

The decree of the court below is reversed with costs.

*A. I. Elkus* and *F. C. McLaughlin*, for the Appellants.  
*John Larkin* and *J. Frankenheimer*, for the Complainant.



United States Circuit Court of Appeals for the Second Circuit.

No. 263, October Term, 1908.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, etc., Complainant-Appellee,

vs.

KESSLER & COMPANY, LTD., FRANK YOCATT, Liquidator, Defendants-Appellants, and J. & P. Coats, Ltd., Intervenor, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Argued March 23, 1909; Decided May 14, 1909.

Before Lacombe, Ward, and Noyes, Circuit Judges.

Appeal from the District Court, Southern District of New York. In view of the statement of facts in the foregoing opinion of Judge Ward, a separate statement is here unnecessary. Such additional facts, however, as have been found necessary to be considered are incorporated in the opinion.

NOYES, *Circuit Judge* (concurring):

While I concur in the result reached by Judge Ward, I am constrained to base my conclusions upon essentially different grounds. And the case is of such importance, both on account of the amount in controversy and the principles involved, that a separate opinion seems called for.

In considering the case from any point of view, one thing is apparent from the outset, and that is the good faith of the parties. Another thing is also apparent. The New York house intended that the securities in question should afford protection to the Manchester house for their acceptances, and the latter supposed that they were obtaining protection. Both parties acted upon the assumption that that which they did accomplished something. The New York house furnished security in the form desired by the Manchester house and the latter accepted the former's drawings upon that security. The transaction if invalid is only so because it contravenes some statute or positive legal principle. And it cannot be declared invalid without inflicting great hardship upon the Manchester house.

In determining the validity of the transaction, it is necessary in the first place to ascertain what its legal nature was. Judge Ward has held that it amounted to a declaration of trust by the New York house in favor of the Manchester house. But I cannot accept this conclusion. It is an essential element in a declaration of trust that title pass from the declarant of the trust as an individual to himself as trustee. It must be shown that he intends to divest himself of the beneficial interest in the property and to hold it thereafter as trustee for the benefit of another. Now it is clear from the

evidence that this is just what the New York house did *not* intend to do. They intended to set aside the obligations only as *security* for their indebtedness to the Manchester house. In case this indebtedness were paid, the latter were to have no interest in the security. The beneficial interest in the property—the equity of redemption—instead of passing to the Manchester house—as would be essential in a declaration of trust—was intended by both parties to remain in the New York house. The initial setting aside of the securities and the course of dealing between the two houses, were, in my opinion, wholly inconsistent with the creation or existence of a declaration of trust. The transaction must stand, if at all, as one in which the Manchester house obtained security only.

Now security might have been afforded either by way of mortgage or pledge. The general distinction between a mortgage and a pledge is that in one the title passes but not necessarily the possession, while in the other the title does not pass but the possession must. A pledge is a mere lien and something less than a mortgage. As said by the Master of the Rolls in *Jones v. Smith, 2 Ves. Jr. 372*: "A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest if not redeemed at a certain time." In this case, the bonds, certificates of stock, promissory notes and other securities were duly endorsed and assigned so that when Kessler and Company of Manchester took possession of them shortly before the bankruptcy proceedings the title to them passed even if it had not done so before. Under these conditions there is the highest authority for saying that when the Manchester house received the securities so endorsed and assigned, it had a double title to them—that of mortgagee and pledgee. In the very case principally relied upon by the defendants—*Casey v. Carver, 96 U. S. 467, 477*—the Supreme Court of the United States in speaking of a case where bills receivable had been both pledged and assigned to a creditor said:

"In such case, they [the securities] are held by the creditor by way of mortgage as well as pledge; and a mortgage is valid notwithstanding the mortgagor has the possession. The difference ordinarily recognized between a mortgage and a pledge is, that the title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge (Pothier, *Nantissement*, 8); and if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual; it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security,—that of mortgage

and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession.

This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their endorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in *White v. Platt*, 5 Denio 269, and in *Clark v. Iselin*, 21 Wall. 360. Hence the actual possession of the securities by the creditor was a matter of less importance in those cases."

I fully appreciate that this language of the Supreme Court seems in conflict with the generally accepted doctrine that a pledge of choses in action does not necessarily become a mortgage because the title is conveyed. In the case of a chose in action there cannot well be a pledge without an assignment. Thus if negotiable paper does not require endorsement, title passes to the pledgee upon delivery; if endorsement is necessary, the fact that it is made does not—it is generally held—necessarily make the transaction a mortgage. In such a case it is necessary that the pledgee should have the title in order to obtain effectual security. Consequently, it has usually been said in the case of endorsed shares of stock and negotiable paper that whether a transaction should be regarded as a mortgage or a pledge, must be determined from the agreement between the parties.

Accepting this latter view as correct there is much to support the contention that the parties in this case intended something more than a pledge. They used the word "escrow" which has usually to do with the passing of title. The securities were delivered to the Manchester house as being *its* property and they had previously been set aside and marked with its name. But I think it unnecessary to determine whether the transaction was a mortgage or a pledge. It is sufficient to say in view of the decision of the Supreme Court, as well as in view of the facts shown in addition to the endorsements indicating a mortgage, that the Manchester house after taking possession, may safely be regarded as holding *both* by way of mortgage and by way of pledge.

Indeed the case of *Casey v. Carver* *supra* would seem to afford authority for the conclusion that the transaction might be valid as a mortgage even if Kessler and Company of Manchester had not taken actual possession of the securities before the bankruptcy. As shown in the extract from the opinion already quoted, the matter of the physical possession of securities is of less importance when they are so endorsed that title will pass than when there is a mere attempted pledge. And in another part of the opinion the court said (96 U. S. 486):

"It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of pledge. A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails. An agreement for a pledge raises no privilege. There is no mortgage; for the title of the securities was never transferred to them. The evidence of the cashier is, that they were all stamped payable to the order of the bank, when discounted. They

were not indorsed by the cashier until the day they were removed by Cavaroe, which was after the bank had failed."

Moreover, were the fact of taking possession absent in this case it would probably be possible to sustain the claim of the Manchester house to the securities upon broader and more satisfactory lines than could be drawn from the distinction just referred to. The legal difference *before delivery* of endorsed and unendorsed securities—except in the case of special indorsements—would seem to be slight. But the equities of the case coupled with what the parties did—aside from any technicality—make out a strong case in support of an equitable lien in the nature of a mortgage upon the security in favor of the Manchester house, valid against the trustee in bankruptcy without a change of possession. It is unnecessary, however, to determine the case—nor to consider it at length—upon the theory that there was no change of possession because, as we have seen, the Manchester house did take possession of the securities and such act is a factor of importance. And, as already shown, after the Manchester house took possession it held the securities both by way of mortgage and by way of pledge.

Now, there being no fraud in the transaction and no rights of purchasers or attaching creditors having intervened, the taking possession of the securities by the Manchester house before the bankruptcy was, in the absence of a statute making it unlawful, entirely legal and proper. Regarded simply as a pledge, the pledgee had the right to take possession. Thus in *Parshall v. Eggert*, 54 N. Y. 18, the court said:

"In the absence of any intermediate right, the parties could perfect a written contract of pledge by subsequent delivery. Even between successive pledgees, without any communication with each other, that one who lawfully obtains possession, at the time of the pledge or subsequently, is entitled to be preferred. \* \* \* A creditor who acquires a specific right to or lien on the thing pledged, may prevent the pledgee's interest in an undelivered chattel from attaching. But such is not the condition of the creditor at large. The only ground on which he can claim to prevent the perfecting of such a right in the pledgee is that it works a fraud upon him."

And in *Jones on Pledges*, (2d Ed.) § 38 it is said:

"A pledge or contract for a pledge, ineffectual for want of delivery, may be rendered valid by a subsequent delivery, even as against an intermediate creditor at large of the pledgor. Of course such subsequent delivery would not prevail against a creditor who had, between the time of the making of the contract and taking possession under it, acquired a specific lien upon the thing pledged by attachment or levy of execution. The only other obstacle which could prevent such a transaction from being effectual would be the intervention of fraud."

When, therefore, the Manchester house obtained possession of the securities it lawfully held them as pledgee and mortgagee unless its rights were affected by some statute. And the only statute which it claimed to operate against it is the provision of the bankruptcy act making transfers of property made under certain conditions within

four months of bankruptcy unlawful preferences. So the primary question whether the act applies in this case is whether, within its meaning, the securities in question were *transferred* within four months of the bankruptcy. If they were not so transferred there was no preference. And the determination of the question of time will dispose of all questions concerning the securities constituting the general escrow.

Manifestly at some time there was a transfer of the securities. When did it take place? If it took place at the time the parties intended to charge the securities for the benefit and protection of the Manchester house; when they were put aside and endorsed; when the equities of the Manchester house were *created*, it took place more than four months prior to the bankruptcy. If, on the other hand, it took place only when the physical possession of the securities was taken, it was within the prescribed period.

Now, as bearing upon this question of time, it is clear that the Manchester house had the *right* at any time to demand and take possession of the securities set aside for its benefit. While the necessity for immediately taking possession was evidently not contemplated by the parties, I think that the very fact that the securities were set aside "in escrow" shows that the right of the Manchester house to take possession was recognized at the beginning. Delivery upon condition is the very essence of an escrow and while that term was improperly used by the parties here to describe their transaction, I think it still carries with it the idea of delivery. And, there being no agreement otherwise, delivery would take place when required by the Manchester house. I have no doubt that after demand the Manchester house could have enforced its rights to the possession of the securities in equity if not in law.

The possession having been actually taken within four months of the bankruptcy, we now reach the decisive question whether it can be held to relate back to the time when the right to take possession was created—whether the act of taking possession created a lien or merely enlarged and perfected an existing lien. And, in my opinion, in view of the equities between the parties and all the circumstances, such act should relate back to the creation of the right which it perfected, and the *transfer* be regarded as having taken place more than four months before the bankruptcy.

The case of *Thompson v. Fairbanks*, 196 U. S. 516, seems directly in point here. In that case a mortgagee took possession, with the consent of the mortgagor, of after acquired property covered by a valid mortgage within four months before bankruptcy proceedings against the mortgagor. But the Supreme Court held that this was done pursuant to a pre-existing right and did not constitute a preference, and quoted with approval the following extract from *Sabin v. Camp*, 98 Fed. 974, where it was held that a transaction which was consummated within the prescribed period was not a preference, because it had originated before:

"What was done was in pursuance of the pre-existing contract, to which no objection was made. Camp furnished the money out of which the property, which is the subject of the sale to him, was

created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security, and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And when, at a later date but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The Supreme Court then went on to say:

"The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created, is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor, whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subjected to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated."

See also *Humphrey v. Tidman*, 108 U. S. 91; *Wood v. United States Fidelity etc. Co.*, 113 Fed. 421.

I think these principles applicable here. While the Supreme Court in the cases referred to treats the validity of the mortgages and the rights of the mortgagees thereunder to be matters of local law, in my opinion it also states this underlying and controlling distinction: The exercise of a pre-existing right well founded in equity is not a preference although occurring within the prescribed period; "the bald creation of a lien within four months" is a preference.

The application of the principle involved in this distinction is decisive here in favor of the Manchester house. It had an equitable right to the securities which were held "in escrow" for its benefit:

its rights and equities were created years before the bankruptcy; it could at any time have enforced its right to the possession of the securities; no element of fraud and no intervening rights of purchasers or attaching creditors appear; the securities were not property the possession of which would be visible to third persons and afford a basis of credit. It is my opinion that possession was taken pursuant to a pre-existing right and that equitable principles support such right. I think that this is in no aspect a case of the bald creation of a lien within four months of bankruptcy.

The case of *Zartman v. First National Bank*, 189 N. Y. 273 relied upon by the appellee as his principal case upon this point, is not in conflict with these views. In that case there was merely a contract to give a mortgage upon after-acquired property. There was no lien which could have been enlarged or perfected by taking possession.

Finally, I think it a serious question whether a mortgagee or pledgee taking possession of property in pursuance and in the enforcement of a pre-existing right of long standing can properly be said to have reasonable cause to believe that the mortgagor in surrendering possession is intending to give him a preference. He takes possession in his own right of that which he looks upon as his own special property. Instead of regarding the transaction as a preference he would, as suggested in *Thompson v. Fairbanks*, 196 U. S. 516, rather take it as a recognition of his right under his mortgage or pledge. (See also *Humphrey v. Tutman*, 198 U. S. 93.)

Upon principles similar to those already considered, I think that the taking of possession by the Manchester house of the securities embraced in the "special escrow" related back to its creation and, consequently, that that transaction although occurring within four months of the bankruptcy, was based upon a contemporaneous consideration and did not constitute a preference.

The decree of the District Court should be reversed with costs.

United States Circuit Court of Appeals, for the Second Circuit.

No. 263, October Term, 1908.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, etc., Complainant-Appellee,

vs.

KESSLER & COMPANY, LTD., FRANK YOUATT, Liquidator, Defendants-Appellants, and J. & P. Coats, Ltd., Intervenor, Defendant-Appellee.

Appeals from the District Court of the United States for the Southern District of New York.

Argued March 23, 1909; Decided May 14, 1909.

Before Lacombe, Ward and Noyes, Circuit Judges.

LACOMBE, Circuit Judge:

I concur in the conclusion that the decree should be reversed, for the reasons set forth in the opinion of Judge Noyes.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 8th day of June, one thousand nine hundred and nine.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

LAWRENCE E. SEXTON, as Trustee, etc., Complainant-Appellee,  
vs.  
KESSLER & COMPANY, LTD., FRANK YOUATT, Liquidator, Defendants-Appellants, and J. & P. Coats, Ltd., Intervenor, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed as to the appellants Kessler & Company Limited and Frank Youatt Liquidator, with costs to said appellants, and that the cause be remanded with instructions to dismiss the bill as to them with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. C. N.

Endorsed: United States Circuit Court of Appeals Second Circuit. Lawrence E. Sexton as trustee, etc., vs. Kessler & Co., Ltd., & another. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jun-9 1909 William Parkin Clerk.

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillette, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

*Petition for Appeal.*

The above named appellee Lawrence E. Sexton as trustee as aforesaid respectfully shows that a final decree has been rendered in the above entitled cause on the 8th day of June 1909 reversing the final decree herein of the District Court of the United States for the South-



ern District of New York and dismissing the complainant's bill of complaint on the merits with costs, and the complainant-appellee conceiving himself aggrieved thereby, and the cause being one in which the United States Circuit Court of Appeals for the Second Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal: the matter in controversy exceeding \$100,000 besides costs.

Wherefore the said complainant-appellee appeals from said decree of the 8th day of June 1909 to the Supreme Court of the United States and prays that this appeal may be allowed and a citation granted directed to the above named defendants-appellants Kessler & Company, Limited and Frank Youatt, Liquidator, commanding them to appear before the Supreme Court of the United States and to do and receive justice in the premises; and that a transcript of the record proceedings and papers upon which the said judgment was rendered may be duly authenticated and sent to the Supreme Court of the United States.

Dated, New York, June 28th, 1909.

JOHN LARKIN,

*Solicitor for Lawrence E. Sexton,  
as Trustee as Aforesaid.*

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed this 28 day of June, 1909.

E. H. LACOMBE, U. S. C. J.

Endorsed: U. S. Circuit Court of Appeals Second Circuit Lawrence E. Sexton as trustee in bankruptcy, appellee, against Kessler & Company, Limited, and another, Appellants. Petition for appeal, John Larkin, attorney for trustee, 14 Wall Street, New York City, United States Circuit Court of Appeals Second Circuit Filed July 1, 1909 William Parkin Clerk.

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillett, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

*Assignment of Errors.*

Lawrence E. Sexton as trustee in bankruptcy as aforesaid having appealed to the Supreme Court of the United States from the final decree of the United States Circuit Court of Appeals for the Second Circuit dated June 8th 1909 and filed in the office of said clerk on June 9th 1909, reversing the final decree of the District Court of the

United States for the Southern District of New York dismissing the complainant's bill of complaint upon the merits with costs, now makes and files the following assignment of errors herein.

1st. The court erred in reversing said decree of the District Court of the United States.

2nd. The said court erred in awarding costs against the said Lawrence E. Sexton upon reversing said decree.

3rd. The said court erred in remanding the cause to the District Court of the United States with instructions to dismiss the bill of complaint with costs.

4th. The said court erred in holding that the transactions between said bankrupts and the defendant Kessler & Company Limited as found by the Master in Chancery and the District Court of the United States constituted a declaration of trust by the bankrupts in favor of the defendant Kessler & Company Limited in respect to the securities which are the subject of this action, or any securities for which said securities were substituted.

5th. The court erred in holding that any trust of the said securities, or securities for which the said securities were substituted, existed in favor of the defendant Kessler & Company Limited.

6th. The court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted a mortgage of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company Limited.

7th. The court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted a pledge of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company Limited.

8th. The court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted an equitable lien in the nature of a mortgage upon the said securities in favor of the defendant Kessler & Company Limited, which equitable lien was valid against the complainant with or without a change of possession.

9th. That the court erred in holding that when the defendant Kessler & Company Limited obtained possession of the said securities on October 25th 1907 it lawfully held them as pledgee or mortgagee.

10th. That the court erred in holding that the transfer of possession of the said securities on October 25th 1907 to the defendant Kessler & Company Limited was not a transfer made within four months of bankruptcy within the meaning of the Act of Congress known as the Bankruptcy Act.

11th. That the court erred in holding that the facts herein as found by the Master in Chancery and by the District Court of the United States did not constitute a voidable preference within the meaning of the Act of Congress known as the Bankruptcy Act.

12th. That the court erred in holding that the transfer of the said securities from the bankrupts Kessler & Company to the defendants Kessler & Co. Limited did not take place within four months of the filing of the petition in bankruptcy.

13th. That the court erred in holding that the taking possession

of said securities by the defendant Kessler & Company Limited on October 25th 1907 related back to June 30th 1903 the time of the arrangement between the bankrupts and the said defendant Kessler & Company Limited or to any other date.

14th. That the court erred in holding that the defendant Kessler & Company Limited had an equitable right to the said securities and that said right and equity were created years before the bankruptcy and that said defendant could at any time have enforced its said right to the possession of said securities, and that no element of fraud or any intervening rights of purchasers or attaching creditors here appear and that said securities were not property, the possession of which would be visible to third persons or would afford a basis of credit, and in holding that such possession was taken by the said defendant on October 25th 1907 in pursuance of a pre-existing right and that no estoppel obtains against the said defendant.

15th. The court erred in holding that the facts herein as found by the Master in Chancery and the District Court of the United States as a matter of law did not and could not constitute reasonable cause in the defendant Kessler & Company Limited to believe that the bankrupts in surrendering possession of said securities on October 25th 1907 intended to give the defendant Kessler & Company Limited a preference, and that said defendant as a matter of law took said possession as a matter of right under a mortgage or pledge.

New York, June 28th 1909.

JOHN LARKIN,

*Solicitor for Complainant.*

Endorsed: U. S. Circuit Court of Appeals Second Circuit Lawrence E. Sexton as trustee in bankruptcy, appellee, against Kessler & Company, Limited, and another, Appellants. Assignment of Errors. John Larkin, attorney for trustee, 44 Wall Street, New York City. United States Circuit Court of Appeals Second Circuit Filed Jul-1, 1909, William Parkin Clerk.

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillett, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

*Order Allowing Supersedeas.*

The complainant Lawrence E. Sexton as trustee as aforesaid having heretofore filed his petition for an appeal from the final decree rendered herein on the 8th day of June 1909 reversing the final decree of the District Court of the United States of the Southern Dis-

trict of New York herein, and dismissing the complainant's bill of complaint upon the merits with costs, and having filed an assignment of errors, said appeal having been heretofore allowed to the petitioner Lawrence E. Sexton as trustee as aforesaid, it is

Ordered that said appeal shall operate as a supersedeas of the decree herein of the 8th day of June 1909 and shall stay the execution of said decree pending such appeal upon the execution of a bond in the penalty of \$5000.

The American Surety Company is accepted as surety on said bond.  
June 28, 1909.

E. H. LACOMBE.

Endorsed: U. S. Circuit Court of Appeals Second Circuit Lawrence E. Sexton as trustee in bankruptcy, appellee, against Kessler & Company, Limited, and another, appellants. John Larkin, attorney for trustee, 44 Wall Street, New York City. United States Circuit Court of Appeals Second Circuit Filed Jul- 1, 1909 William Parkin Clerk.

American Surety Company of New York.

Capital and Surplus. \$5,000,000.

Company's Office Building, 100 Broadway, New York.

Know all men by these presents, That, We, The American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, of #100 Broadway, Manhattan Borough, New York City, are held and firmly bound unto Kessler & Company, Ltd., and Frank Youatt, Liquidator, in the sum of Five Thousand Dollars (\$5,000), to be paid to the said Kessler & Company, Ltd., and Frank Youatt, Liquidator, for the payment of which, well and truly to be made, we bind ourselves, and our successors, firmly by these presents.

Sealed with our seals and dated the first day of July, in the year of our Lord, nineteen hundred and nine.

Whereas, lately at a term of the United States District Court, in and for the Southern District of New York, in a suit depending in said Court, between Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Company, and of Alfred Kessler, Rudolf E. S. Flinsch and William K. Gillett, composing said Kessler and Company, Complainant, and Kessler and Company, Ltd., and Frank Youatt, Liquidator, defendants, a decree was rendered against the said defendants, setting aside the transfer of certain securities therein mentioned and described.

And, whereas, the said defendants have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, which Court has rendered a decree dated June 8th, 1909, and filed in the office of the Clerk of said Court on the 9th day of June, 1909, reversing the decree so as aforesaid appealed from and remanding the case to the District Court of the United States for the Southern

District of New York with directions to dismiss the bill of complaint, and the said complainant having prosecuted an appeal to the Supreme Court of the United States to reverse the said decree of the United States Circuit Court of Appeals for the Second Circuit, and said appeal having been allowed and a citation issued directed to said defendants citing and admonishing them to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now therefore the condition of this obligation is such, that if the said Lawrence E. Sexton as Trustee in Bankruptcy of Kessler and Company and of Alfred Kessler, Rudolf E. S. Flinsch and William K. Gillett, composing said Kessler and Company, shall prosecute said appeal to effect and answer all damages and costs if he fails to make his plea good, then this obligation shall be void, otherwise we, the above bounded American Surety Company of New York, shall do the same for him.

AMERICAN SURETY COMPANY  
OF NEW YORK,  
By HORACE P. HOLLISTER,  
*Resident Vice President.*

Attest:

[L. s.] MARSHALL L. BROWER,  
*Resident Assistant Secretary.*

Form C. 237. 2500-11-'08.

STATE OF NEW YORK,  
*County of New York, ss:*

On this 1st day of July, 1909, before me personally appeared Horace P. Hollister, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in Mt. Vernon, N. Y.; that he is the Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister further said that he is acquainted with Marshall L. Brower and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Marshall L. Brower subscribed to said instrument, is in the genuine handwriting of the said Marshall L. Brower and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Horace P. Hollister, Resident Vice-President.

[L. s.]

JARED F. HARRISON, JR.,  
*Notary Public, New York County.*

STATE OF NEW YORK,  
*County of New York, ss:*

Marshall L. Brower being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws. That said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, Stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$5,250,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

MARSHALL L. BROWER.

Subscribed and sworn before me this 1st day of July, 1909.

[L. s.]

JARED F. HARRISON, JR.,

*Notary Public, New York County.*

Form G 362.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Company's Office Building, 100 Broadway, N. Y.

*Financial Statement, March 31, 1909.*

Resources.

Real Estate:

Home Office	
Building and	
Land, unen-	
cumbered . . .	\$3,000,000.00
N. Y. City Water	
Front, unen-	
cumbered . . .	166,047.91

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\$3,166,047.91

Stocks and Bonds, Market Value . . .	2,925,183.83
Cash in Banks and Offices . . . . .	838,220.54
Premiums in Course of Collection . .	288,799.02
Accrued Interest and Rents . . . . .	32,137.20
Bills and Accounts Receivable . . . .	184,750.00

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\$7,435,138.50

## Liabilities.

Capital Stock .....	\$2,500,000.00	
Surplus .....	2,957,121.24	
Reserve for Re-Insurance .....	1,247,506.43	
Reserve for Contingent Claims .....	674,025.53	
Reserve for Contingent Expenses .....	25,000.00	
Bills and Accounts Payable, not due .....	31,485.30	
		<u>\$7,435,138.50</u>

In addition to the above Resources the Company owns:—

Real Estate—unencumbered—in various places, of the value of .....	\$63,175.00
Advances secured by Collateral .....	301,254.32
Deposits in suspended Banks (\$92,565.59), on which will be realized not less than .....	32,444.69
	<u>\$396,874.01</u>

*Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 20, 1909, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 15, 1908, for the purpose of nominating officers of the Company, \* \* \* for the ensuing year beg leave to report as follows:

"We nominate for \* \* \*

Place.	Resident Vice-Presidents.	Resident Assistant Secretaries.
New York, N. Y.	Richard Deming Horace P. Hollister	A. L. Adams Marshall L. Brower W. H. Bishop Horace P. Hollister H. H. Simpson

\* \* \* \* \*

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

\* \* \* \* \*

"The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

\* \* \* \* \*

STATE OF NEW YORK

*County of New York, ss:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 22nd day of January, 1909.

[L. s.]

F. J. PARRY,  
*Assistant Secretary.*

Endorsed: Lawrence E. Sexton trustee in bankruptcy of Kessler & Company complainant against Kessler & Company, Ltd., and Frank Youatt Liquidator, defendants & respondents. Bond. Dated July first, 1909. Approved H. G. Ward July 8, 1909 United States Circuit Court of Appeals Second Circuit Filed Jul- 1 1909 William Parkin Clerk.



UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 1164 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Lawrence E. Sexton, as Trustee, etc. against Kessler & Company, Ltd., Frank Youatt, Liquidator, and J. & P. Coats, Ltd., as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 8th day of July in the year of our Lord One Thousand Nine Hundred and Nine and of the Independence of the said United States the One Hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Second  
 Circuit.]

WM. PARKIN, *Clerk.*

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillette, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

*Citation.*

United States of America to Kessler & Company, Limited, and Frank Youatt, Liquidator, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington in the District of Columbia thirty days after the date of this citation pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein Lawrence E. Sexton as trustee as aforesaid is appellee and you are appellants to show cause, if any there be, why the final decree entered against the said appellee on the 8th day of June 1909 as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 28th day of June, 1909 in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

E. H. LACOMBE,

*Judge of the United States Circuit Court  
 of Appeals for the Second Circuit.*

Service of this citation is acknowledged on behalf of appellants Kessler & Company, Limited and Frank Youatt, Liquidator, this 28th day of June, 1909.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,  
*Solicitors and of Counsel for Appellants.*

[Endorsed:] U. S. Circuit Court of Appeals Second Circuit. Lawrence E. Sexton as trustee in Bankruptcy, Appellee, against Kessler & Company, Limited, and another, Appellants. Original citation. John Larkin, Attorney for trustee, 44 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed July 7, 1909. William Parkin, Clerk.

Endorsed on cover: File No. 21,756. U. S. Circuit Court Appeals, 2d Circuit. Term No. 530. Lawrence E. Sexton, as trustee in bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillette, composing the firm of Kessler & Company, and of the said Kessler & Company, appellant, vs. Kessler & Company, Limited, and Frank Youatt, liquidator. Filed July 16th, 1909. File No. 21,756.

# United States Supreme Court.

LAWRENCE E. SEXTON, as Trustee  
in Bankruptcy of Alfred Kessler,  
Rudolf E. F. Flinsch and Will-  
iam K. Gillett, composing the  
firm of Kessler & Company and  
of said Kessler & Company.

*Appellant,*

*against*

KESSLER & Co., Limited, and  
FRANK YOUATT, Liquidator,

*Appellees.*

**No. 530.  
October Term,  
1909.**

**Affidavit on  
Motion to Ad-  
vance on the  
Calendar.**

UNITED STATES OF AMERICA, }  
Southern District of New York, } ss.:  
State and County of New York, }

FREDERICK C. McLAUGHLIN, being duly sworn,  
deposes and says, I am a member of the firm of  
McLaughlin, Russell, Coe & Sprague, the solicitors  
for the above-named defendants-appellees and of  
counsel for them in this court.

This is a suit by the Trustee in Bankruptcy above  
named to set aside an alleged transfer as a voidable  
preference.

The property involved is of the value of upwards  
of two hundred and fifty-seven thousand dollars.  
The defendant-appellee, Kessler & Co., Limited, an  
English corporation, took possession before bank-

ruptcy of the property under a written agreement made four and one-half years before the bankruptcy, pursuant to which agreement said property had been set aside to secure said Kessler & Co., Limited, against its continuing acceptances of drafts and bills of exchange drawn on it by the firm of Kessler & Company of New York, now bankrupt, at all times aggregating about eighty thousand pounds.

Kessler & Co., Ltd., within two months prior to the bankruptcy of Kessler & Company of New York, accepted drafts drawn on it by the firm of Kessler & Company of New York in the aggregate amount of about three hundred and eighty-four thousand dollars. These drafts fell due shortly after the filing of the petition in bankruptcy against the New York firm on November 8th, 1907, in the District Court for the Southern District of New York.

The Bankruptcy Court immediately upon the filing of the petition issued an injunction preventing Kessler & Co., Ltd., defendant-appellee, from realizing upon its securities pending this suit, and as a direct and immediate result of this injunction, Kessler & Co., Ltd., were forced into a voluntary liquidation under the English Companies' Acts, Frank Youatt being named as Liquidator.

This liquidation has proceeded to the point where I am informed the creditors of the English corporation of Kessler & Co., Ltd., have been paid in cash fifty per cent. of their claims, including the creditors on the accepted bills drawn by the bankrupts on said Kessler & Co., Ltd., and the remaining assets in the hands of the Liquidator of the English corporation are just about sufficient to pay its creditors in full, leaving practically nothing for the shareholders.

The Circuit Court of Appeals for the Second Circuit unanimously decided in favor of the defendants

-appellees, and sustained their rights to the securities under their contract with the now bankrupts (*R.*, 1145, 1133, 1138, 1144). A more detailed statement of the facts of the case is contained in the opinion of *WARD, J.*, in the Circuit Court of Appeals, Second Circuit, *R.*, page 1133, an extract from which is hereto annexed, showing the agreement and circumstances under which the drafts were accepted and the securities set aside to protect them.

This litigation has been pending for nearly two years during which period Kessler & Co., Limited, has been enjoined as aforesaid. Its assets have been held by Mr. Youatt, as its Liquidator, who has been endeavoring to maintain it as a going concern and to pay off the creditors in full.

Its creditors are now clamoring for a sale of the remaining assets and final winding up of the business which has been in existence for almost one hundred years and never before has been in financial difficulties.

Unless a speedy hearing and determination of this appeal can be had, the ruin of this old established house will be complete, as the Liquidator will be forced to close down the business, sell its remaining assets, which consist of stocks of cotton and other merchandise and outstanding accounts all over the world, at a forced sale in order to pay the creditors in full leaving nothing to be handed back to the shareholders except a possible small equity in the preferred stock.

If, however, a speedy hearing and determination of this appeal be had and the unanimous decree of the Circuit Court of Appeals affirmed, the property which is the subject of this suit will be released by the dissolution of the injunctions herein and this property will be sufficient to satisfy the immediate demands of the creditors of Kessler &

Co., Ltd. The Liquidator then will be able to turn the business back to the shareholders as a going concern.

Prior to the liquidation forced by the injunction issued herein, Kessel & Co., Ltd., had a business extending to all parts of the world amounting to about five million dollars gross annually.

I am definitely informed by Mr. Youatt that the creditors of Kessler & Co., Ltd., cannot be held off much longer and that the only possible chance of preserving the business as a going concern and of restoring it to its shareholders is a speedy determination of this litigation in favor of the appellees, and that if the hearing is delayed until this case is reached in regular order he will be forced to wind up the business.

On the foregoing facts I respectfully submit that the defendants-appellees are entitled to all consideration consistent with the rules of this court to the end that a speedy hearing and determination of the appeal may be had and whatever relief they may be entitled to be granted before it is too late to save their business from ruin.

The complainant-appellant, the Trustee in Bankruptcy aforesaid, as appears by the consent of his solicitor and counsel Mr. John Larkin hereto annexed, joins in applying for the advancement of this appeal for hearing in this court as of the greatest importance also to him as such Trustee and the numerous creditors of the bankrupt estate, and the defendants-appellees make this motion to advance the appeal for hearing for the reasons above stated.

The transcript of the record herein has been duly docketed and filed and the appeal is duly on the calendar of this court as No. 530, October Term, 1909. The brief of the defendants-appellees is ready and I am informed that the brief of the complainant-appellant will be in a few days.

I therefore respectfully pray that an order may be made under the rules of this court advancing the case and directing it to be heard at an early date.

FREDERICK C. McLAUGHLIN.

Subscribed and sworn to before )  
me 8th day of October, 1909. )

RUFUS W. SPRAGUE, JR.,  
Notary Public,  
New York County.

EXTRACT FROM STATEMENT OF FACTS BY WARD,  
J., IN HIS OPINION RENDERED IN THE CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT (R.,  
1133):

“Kessler & Company of New York, engaged in the business of banking and foreign exchange, had for a long time drawn upon Kessler & Co., Ltd., of Manchester, without giving any security for payment of its drafts. Early in 1903 the Manchester house wrote to the New York house as follows:

‘We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30 of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

‘We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for.’

In accordance with this letter the New York house, on June 30, wrote the Manchester house:

‘In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe deposit vault the following securities,



package marked 'Escrow for account of Kessler & Co., Limited, Manchester':

1484 shares Oklahoma Gas & Electric Co. at 25.....	\$37,100.00
2428 shares United Lighting & Heating Co. at 12.....	29,136.00
2352 shares Daimler Manufacturing Company at 50...	117,600.00
\$373,000 United Breweries Co. first 6's at 65.....	242,245.00
	<hr/> \$406,081.00

This escrow is intended as a protection against our long drawings against your good selves.

July 8, the Manchester house replied as follows:

'We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawing on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing the securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should, of course, like to see rather better quality.'

December 23, 1903, the Manchester house wrote to the New York house, as follows:

'For the purpose of the audit of our books for our yearly balance sheet, we should be obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st of December.

We do not think the matter will pre-

sent any difficulty for you. Something in the form of the enclosed is what we require. \* \* \*

We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities.

Names, secs. and market value.'

The New York house not only conformed to these directions but in addition entered the securities so set aside and all substitutions of them on their loan book and notified the Manchester house of substitutions made from time to time. The securities were always either negotiable by delivery or endorsed in blank. The two houses did business in strict conformity with the foregoing arrangement until the fall of 1907 when a financial panic occurred in the City of New York.

October 25th the stability of the New York house being in doubt it delivered to an agent of the Manchester house then in New York City the escrow securities, which he deposited in a safe deposit company in the name of the Manchester house.

November 8 a petition in bankruptcy was filed against the New York house and November 27 it was adjudicated a bankrupt."

## SUPREME COURT OF THE UNITED STATES.

LAWRENCE E. SEXTON, as Trustee  
in Bankruptcy of Alfred Kessler,  
Rudolf E. F. Flinsch and Will-  
iam K. Gillett, composing the  
firm of Kessler & Company,  
\* and of the said Kessler & Com-  
pany,

*Complainant-Appellant,*  
*against*

KESSLER & Co., Limited, and  
FRANK YOUATT, Liquidator,  
*Defendants-Appellees.*

Waiver of No-  
tice of Mo-  
tion and con-  
sent to Ad-  
vancement  
of Case.

I, the undersigned, solicitor and counsel for the complainant-appellant, Lawrence E. Sexton as trustee in bankruptcy aforesaid, do hereby waive notice of motion to advance this case upon the calendar, and do hereby consent that this case may be advanced upon the calendar, if the Court shall in its discretion so decide, and that an order to that effect may be made by the Court setting the case for hearing on an early day not, however, prior to the second week in November, 1909.

Dated October 8th, 1909.

JOHN LARKIN,  
Solicitor and Counsel  
for Complainant-Appellant.

# Supreme Court of the United States

OCTOBER TERM, 1909.

No. **92**

Office Supreme Court U. S.

FILED

APR 18 1910

JAMES H. MCKENNEY,

Clerk

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, &c.

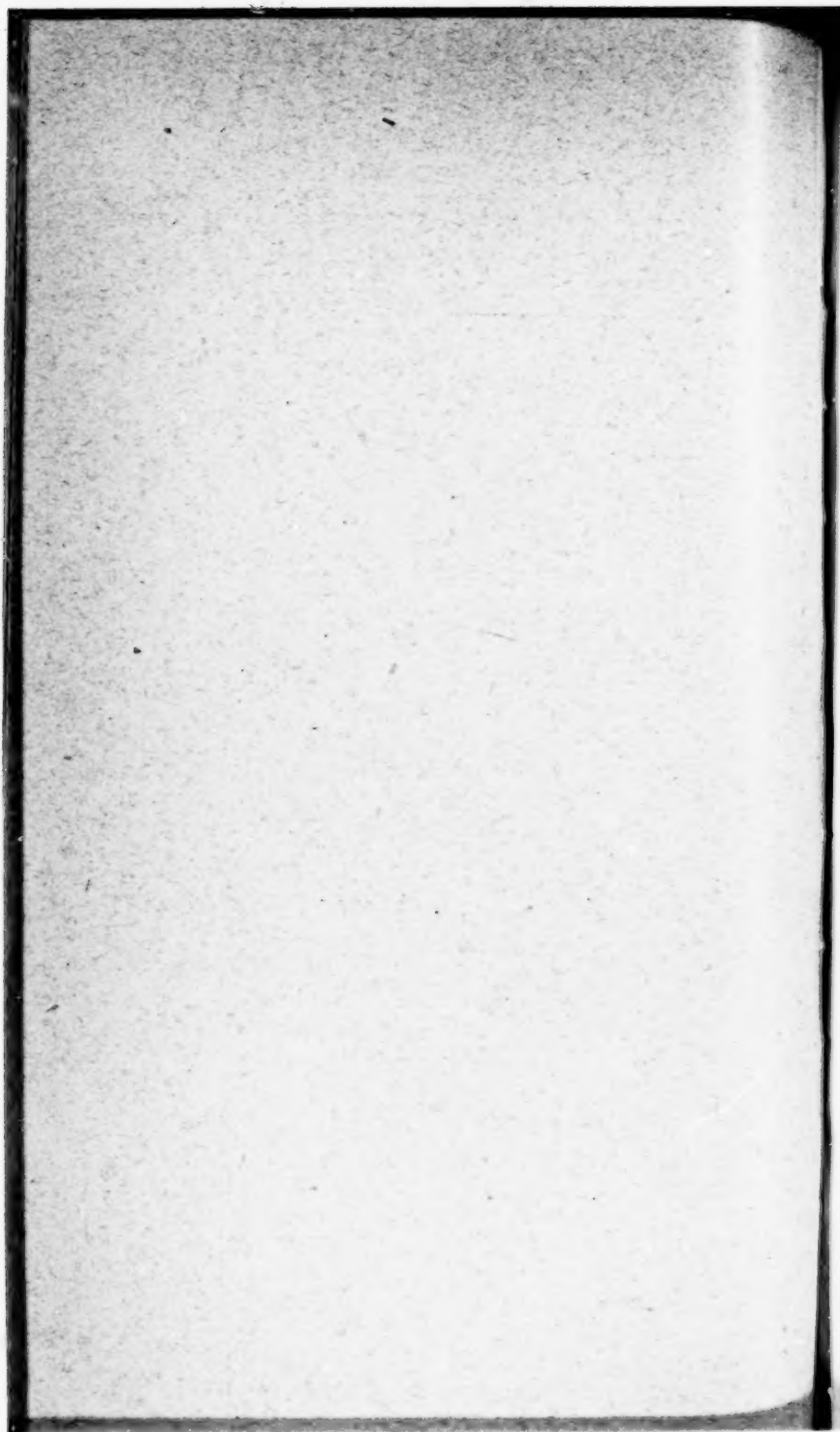
Appellant

against

KESSLER & COMPANY, Limited, et al.

## MOTION OF JOHN GORLOW FOR LEAVE TO INTERVENE AND AFFIDAVIT OF JOHN GORLOW

HENRY WOLLMAN  
KURNAL R. BABBITT  
Counsel for John Gorlow



# Supreme Court of the United States.

No. 530

LAWRENCE E. SEXTON, as Trustee  
in Bankruptcy of Alfred Kessler,  
Rudolph E. F. Flinsch and  
William K. Gillett, composing  
the firm of Kessler & Company,  
and of said Kessler & Company,  
*Appellant,*

*vs.*

KESSLER & COMPANY, Limited, and  
FRANK YOUATT, Liquidator.

Motion.  
Notice of

To:—

Lawrence E. Sexton, Esq., as Trustee in Bankruptcy of the Estate of Alfred Kessler, Rudolph E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Co., and of said Kessler & Co., and John Larkin, Esq., his solicitor and counsel; Kessler & Co., Ltd., and Frank Youatt, as Liquidator of Kessler & Co., Ltd., and Messrs. McLaughlin, Russel, Coe & Sprague, Esqs., their solicitors and counsel:

You and each of you will please take notice that the undersigned petitioner, John Gorlow, on Monday, April 18, 1910, in the Court room of the above entitled Court in Washington, D. C., at the opening of said Court or as soon thereafter as counsel can be heard, on the accompanying affidavit of petitioner, John Gorlow, and on the accompanying brief, and on the printed Tran-

script of Record in the above entitled cause, being known as No. 530 in the United States Supreme Court, will move said Court for an order allowing said petitioner to intervene in the above entitled suit with reference to the 766 shares of the capital stock of the Cripple Creek Central Railway Co. referred to in the Printed Transcript of Record in the above entitled appeal, and which is the only stock of the Cripple Creek Central Railway Co. involved in this suit or appeal, and bringing in as parties to said intervention, Taylor, Smith & Evans, George F. Fry and Mrs Von Neufville, and directing the District Court for the Southern District of New York, or some Master or Commissioner to be appointed by this Court, to hear the claim of this petitioner to said stock, and in case said District Court is directed to hear said intervention, either to report to this Court with reference thereto, or itself to determine the issues; and if a Commissioner is appointed, then such Commissioner shall be directed to take the testimony and report to this Court with reference to the law and facts; and will move this Court further for such other or further order as shall be equitable, just and proper in the premises.

Dated, New York, April 1, 1910.

HENRY WOLLMAN,  
Solicitor for Petitioner  
John Gorlow,  
20 Broad Street,  
New York City.

HENRY WOLLMAN,  
KURNAL R. BABBITT,  
of Counsel.

## Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee  
in Bankruptcy of Alfred Kessler,  
Rudolph E. F. Flinsch and  
William K. Gillett, composing  
the firm of Kessler & Company,  
and of said Kessler & Company,

*Appellant,*

*vs.*

KESSLER & COMPANY, Limited, and  
FRANK YOUATT, Liquidator,

No. 530.

### AFFIDAVIT OF JOHN GORLOW.

STATE OF NEW YORK, )  
County of New York. ) ss.:

JOHN GORLOW, being duly sworn, deposes and says:

That during all the times hereinafter referred to, the above named Alfred Kessler, Rudolph E. F. Flinsch and William K. Gillett were partners in the banking business at No. 54 Wall Street, in the City of New York, under the name of Kessler & Co. That for a long time before and on October 25, 1907, Frank E. Hagemeyer, Taylor, Smith & Evans, W. J. Matheson, George F. Fry, Johann Goll & Söhne, Oliver Gildersleeve Mrs. E. Von Neufville, Deichman & Co., Bank für Handel & Industrie, F. W. Shibley & Co., A. H. Hagemeyer, Karl C. Schuyler, George E. Lindley, Charles M. MacNeill, Frederick Ayer, Charles



F. Ayer, Spencer Penrose and Henry M. Blackmer, (all of whom together may for convenience be hereinafter designated as "said owners"), were the owners of 466 shares of the preferred stock and 300 shares of the common stock of the Cripple Creek Central Railway Company, a corporation, and of the certificates representing the same, and that said stock and said certificates are the same stock and the same certificates involved in this, the above entitled suit and appeal in this Court, No. 530.

Your petitioner further states that said stock and stock certificates were deposited by "said owners" with Kessler & Co., bankers, as aforesaid, as custodians and without any power or authority on the part of said Kessler & Co. to transfer or dispose of the same.

That on or about October 23, 1907, said Kessler & Co., without any right or authority, transferred and delivered the certificates representing said 766 shares of stock to Kessler & Co., Limited, of Manchester, England, a corporation of Great Britain.

That on or about November 8, 1907, Kessler & Co. were adjudicated bankrupts in a bankruptcy proceeding pending in the United States District Court, for the Southern District of New York. That Lawrence E. Sexton was appointed receiver and subsequently was appointed Trustee in bankruptcy of the co-partnership estate of said Kessler & Co. and of the estates of the individual partners and that said Sexton is now such Trustee. That the corporation of Kessler & Co., Ltd., was on or about November 18, 1907, placed in liquidation and that Frank Youatt, a citizen of Great Britain, was appointed and is Liquidator of said corporation. That said Kessler & Co., Ltd., and said Youatt, Liquidator, entered into the

aforesaid bankruptcy proceedings of Kessler & Co., and filed a paper setting forth that said Sexton, then receiver of Kessler & Co., was claiming said 766 shares of Cripple Creek Central Railway Co. stock, together with nearly Two million dollars of other securities which had been transferred to Kessler & Co., Ltd., and asking that said Sexton be required to formulate his claim, and that the same be sent to a Special Commissioner for determination. A copy of said paper so filed by said Kessler & Co., Ltd., and Youatt, Liquidator, is set forth at pages 2 to 10 of the Printed Transcript of Record in the above entitled appeal.

That thereupon issues as between said Sexton and said Kessler & Co., Ltd., and Youatt were framed. Said Sexton claimed said property on the ground that the transfer by Kessler & Co. to Kessler & Co., Ltd., was a preference in violation of the Bankruptcy Act, which was denied by said Kessler & Co., Ltd., and said Youatt, Liquidator. A copy of the claim of said Sexton and the answer thereto of said Kessler & Co., Ltd., and Youatt appears on pages 12 to 19 of said Transcript.

That thereafter, the issues between said Sexton, Trustee, and said Kessler & Co., Ltd., and said Youatt, were tried before Peter B. Olney, Esq., Referee in Bankruptcy, who was appointed Special Master to determine the same. That said Olney reported to said District Court in favor of awarding all said property to said Sexton, Trustee (pp. 998 to 1064 of said Transcript). That the District Court affirmed the report of said Olney and entered a decree in favor of Sexton, Trustee (pp. 1095 to 1104 of said Transcript). That in order to obviate the necessity of giving

an appeal bond, said Kessler & Co., Ltd., and said Youatt, Liquidator, by an order of said District Court, were required to deliver said Cripple Creek Central Railway Co. stock and all the other securities involved in said contest, to said Sexton, Trustee, to be held by him as an officer of the Court, authorizing him to collect the interest and dividends on the various securities and hold the same as an officer of the Court. A copy of said order appears on pages 1109 to 1112 of said Transcript. That Kessler & Co., Ltd., and said Youatt, Liquidator, did deliver the certificates of said Cripple Creek Central Railway Co. stock and all said securities to said Sexton as an officer of said Court, and that he now holds the same as such officer. That thereafter the decree of said District Court was reversed by the Circuit Court of Appeals of the Second Circuit, and thereafter a supersedeas was granted and said cause appealed by said Trustee, to this Court (pp. 1112 to 1155 of said Transcript) and that the same is this, the above entitled cause, No. 530.

That there were quite a number of persons outside of "said owners" who claimed an interest in or lien upon said Cripple Creek Central Railway Co. stock, and that all of said parties making such claims, not, however, including Kessler & Co., Ltd., and Youatt, Liquidator, released to "said owners" all claims against such stock, and thereupon they entered into an agreement with each other, signed by all of said parties, in the nature of a proposition, addressed to said Sexton as Trustee in Bankruptcy of Kessler & Co., in which agreement the parties hereinbefore designated as "said owners" were designated as the "paid up participants", and in which the Lawyers' Title Insurance & Trust Co. of New York is designated as "said Lawyers'

\* \* \* \* Trust Co." The following statements are made in said agreement with reference to said 766 shares of Cripple Creek Central Railway Co. stock: "All said stock delivered to Kessler & Co., Ltd., Manchester, as aforesaid, belongs to the 'paid up participants'. In the event of its recovery by you (The Trustee) in any suit or proceeding, said stock in the hands of Kessler & Co., Ltd., shall be delivered by you, said Trustee, to said 'Lawyers' \* \* \* Trust Co.' for said 'paid up participants' as, if and when the same shall be received by you, but this shall not affect or impair the right of said 'paid up participants' to bring such suits or proceedings against others than those agreed to be released under the provisions hereof, for the recovery of said Kessler & Co., Ltd., stock, or such suits or proceedings with reference to said stock or their claims in or growing out of the same as they or any of them shall deem proper."

That after the finding of said Olney, as Master, in this proceeding, said parties presented said agreement to said Bankruptcy Court having charge of said estate and said agreement was approved by said Bankruptcy Court, September 16, 1908.

That thereafter all "said owners" of said Cripple Creek Central Railway Co. stock, except Taylor, Smith & Evans, George F. Fry and Mrs. E. Von Neufville, assigned to your petitioner, John Gorlow, all of their interests in said 766 shares of Cripple Creek stock, and the certificates representing the same.

That thereafter, on or about November 17, 1909, your petitioner gave notice to all the parties hereto that he would on November 22, 1909, make application to said District Court for leave to intervene in said proceeding to ob-

tain said Cripple Creek Central Railway Co. stock.

That at the hearing of said application, said Sexton, Trustee, and said Kessler & Co., Ltd., and said Youatt, Liquidator, appeared. That United States District Judge Hough, before whom said application to intervene was made, denied the same and rendered the following opinion:

"On motion by John Gorlow for leave to intervene.

"One of two propositions is certainly true:

"1. Either this Court is now without any jurisdiction to make any order in this case; or 2: The only order that it can make at present (if appeal to the Supreme Court were discontinued) is to execute the mandate of the Circuit Court of Appeals.

"There may be a *tertium quid* on the consent of parties, but not otherwise. The Court may have power at present to direct a lawful order to the custodian of the property which is the subject of this action.

"None of these powers do Mr. Gorlow the slightest good.

"The motion is denied, with leave to renew in the event only of the ultimate order of the Supreme Court of the United States conferring upon this Court any further powers than those above enumerated in respect of this cause."

Thereupon an order was entered denying said application in the following words:

"Ordered that said motion be and the same hereby is denied with leave to renew in the event only of the ultimate order of the Supreme Court of the United States conferring upon this Court power to entertain said motion."

Your petitioner is informed by his counsel, Henry Wollman, Esq., who was counsel for the greater part of "said owners" from about the time the bankruptcy proceedings were begun against Kessler & Co., that Kessler & Co., Ltd., and also the New York counsel of Kessler & Co., Ltd., and of the Liquidator of said corporation, knew at the time said bankruptcy proceedings were begun, if they did not know it before that, that all "said owners" claimed to own said Cripple Creek stock then in the possession of Kessler & Co., Ltd.

JOHN GORLOW.

Subscribed and sworn to before  
me, a Notary Public in and  
for the County of New York,  
in the State of New York, the  
30th day of March, 1910. }

Milton G. Buckey,  
Notary Public,  
Kings County.

Certificate filed in New York County, N. Y.  
(Notary's Seal.)

## Supreme Court of the United States.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E.  
F. FLINSCH and WILLIAM K.  
GILLETT, composing the firm  
of Kessler & Company,  
Bankrupts.

LAWRENCE E. SEXTON, as Re-  
ceiver in Bankruptcy of Al-  
fred Kessler, Rudolf E.  
F. Flinsch and William K.  
Gillett, composing the firm  
of Kessler & Company, and  
the said Kessler & Company,  
Appellant,

AGAINST

KESSLER & COMPANY, Limited,  
and FRANK YOUATT, Liqui-  
dator,

Respondents.

Office Supreme Court, U. S.  
FILED.

APR 16 1910

JAMES H. MCKENNEY.

Oct. Term, 1909.

No. ~~2223~~ 92

### BRIEF ON BEHALF OF TRUSTEE IN BANK- RUPTCY IN OPPOSITION TO GORLOW'S MOTION TO INTERVENE.

This cause has been tried and several thousand pages of evidence have been taken. The District Court has passed judgment upon the issues, the Cir-

cuit Court of Appeals has passed judgment upon the issues, and the case is now before this Court upon appeal.

The present attorney for the petitioner had personal knowledge of the litigation between the parties hereto as early as November, 1907, at which time he represented the "Syndicate" of claimants to the property set forth in the petition. Gorlow, the present petitioner, knew of the litigation, as did several other members of the syndicate.

Notwithstanding this, they have allowed the litigation to proceed for two and a half years without taking any step to become a party thereto.

If there is any power in this Court to grant the order prayed for the motion should be denied because of laches.

If Gorlow were allowed to intervene in this court, what would follow? Would he intervene only on the record as it stands, and proceed as a sort of *amicus curiæ* to assist the Court in determining whether Henry Kessler obtained an invalid preference when on October 25, 1907, he possessed himself of the securities? Clearly not:

Northern Securities Co. v. U. S., 191  
U. S., 555,

for the intervention would be useless, as Gorlow's claim is expressly asserted as hostile and superior to both appellant's and respondents', and (Gorlow's Brief, p. 2), "his title to the stock cannot be affected in the slightest by the decision which will be rendered by the Court in this case." Why then should he be allowed to interfere if the decision cannot affect him?

If Gorlow intervene will this Court order a reference or take testimony on his claims?

Clearly not, because the jurisdiction of this Court is appellate only, and is to determine whether the facts as found by the Referee, adopted by the District Court, and not disturbed by the Court of Appeals, require a decree in favor of the appellant or of the



respondents. In that question of law Gorlow has no interest.

We have searched in vain to find a case where a claimant was in the manner now suggested, allowed to intervene in an appeal to this Court. The application should be made to the court of original jurisdiction, and upon appeal this Court will consider the propriety of its disposition.

*French v. Gates*, 105 U. S., 509.

*Krippendorf v. Hyde*, 110 U. S., 276.

*Bryan v. Bernheimer*, 181 U. S., 188,  
198.

The Bankruptcy Act, Sec. 2, Sub. 7, invests courts of bankruptcy (there enumerated, omitting reference to this court) with power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided"; and thereunder claimants to property in possession of the bankruptcy court are allowed to intervene *in that court* and try out title to the property:

*Re Whitever*, 105 F. R., 180, and cases cited in 1 Fed. Stat. Ann., 534*n*.

But if they do not make timely application, intervention will not be allowed.

*Smith v. Gale*, 144 U. S., 509.

And if there is no intervention the would-be intervenor's rights are in no way affected by the Court's determination:

*Hook v. Payne*, 14 Wall., 252.

*Smith v. Gale*, 144 U. S., 509.

On the question of laches the words of this Court in

*Ward v. Sherman*, 192 U. S., 168,  
176-7;

*Gallihier v. Cadwell*, 145 U. S., 368, 373;

*Penn Mutual, &c., v. Austin*, 168 U. S.,  
685;

are apt. Gorlow was either entitled or not entitled to intervene in this controversy. Had he made a timely application to the District Court, and been allowed to intervene, all his evidence could have been taken and concluded more than two years ago in the one reference. If he intervenes now and here, the appeal records we have prepared at great labor and expense will be superseded, the expenses of a new reference will largely exceed the cost in the former reference of determining Gorlow's claim, and the settlement of the controversy between Sexton and Kessler, Ltd., will be indefinitely postponed, although Gorlow makes no claim to two-thirds of the subject matter of that controversy.

We have examined the cases cited by the petitioner as authority for making the application to this Court, and cannot find in them any support for his position. They distinctly recognize the District Court, even where appeal and supersedeas have been effected, as the proper place for an application affecting matters not before the appellate court:

*Spring v. Insur. Co.*, 6 Wheat., 519  
(selling the *res* and investing the proceeds).

*Hovey v. McDonald*, 109 U. S., 150  
(punishing violations of an injunction pending appeal therefrom).

*Fuller v. Butler*, 182 U. S., 562 (granting new trial pending appeal from judgment).

*Natal v. Louisiana*, 123 U. S., 31.

In his application to the District Court Gorlow well observed that "the jurisdiction of this [the District] Court over that property has not been removed to the United States Supreme Court. All that has been removed to the Supreme Court is a single controversy with reference thereto"; unless so, "an appeal on any one of say a dozen claims paralyzes the power of this [the District] Court to adjudicate

any other claim and robs the Court of 'jurisdiction to hear and determine all questions relating to the title, possession or control of the property' (Murphy v. Hoffman, 211 U. S., 154), or, in other words, an appeal on one question deprives the court of jurisdiction over all other questions relating to the property."

The motion should be denied because:

1. Made to the wrong court;
2. Of petitioner's laches;
3. By his own showing he cannot be interested in the determination of this appeal.

April 18, 1910.

Respectfully submitted,

JOHN LARKIN,  
Attorney for Appellant.

APR 16 1970

JAMES H. MCKENNEY,

SEC. 790-1

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. ~~1003~~ 92

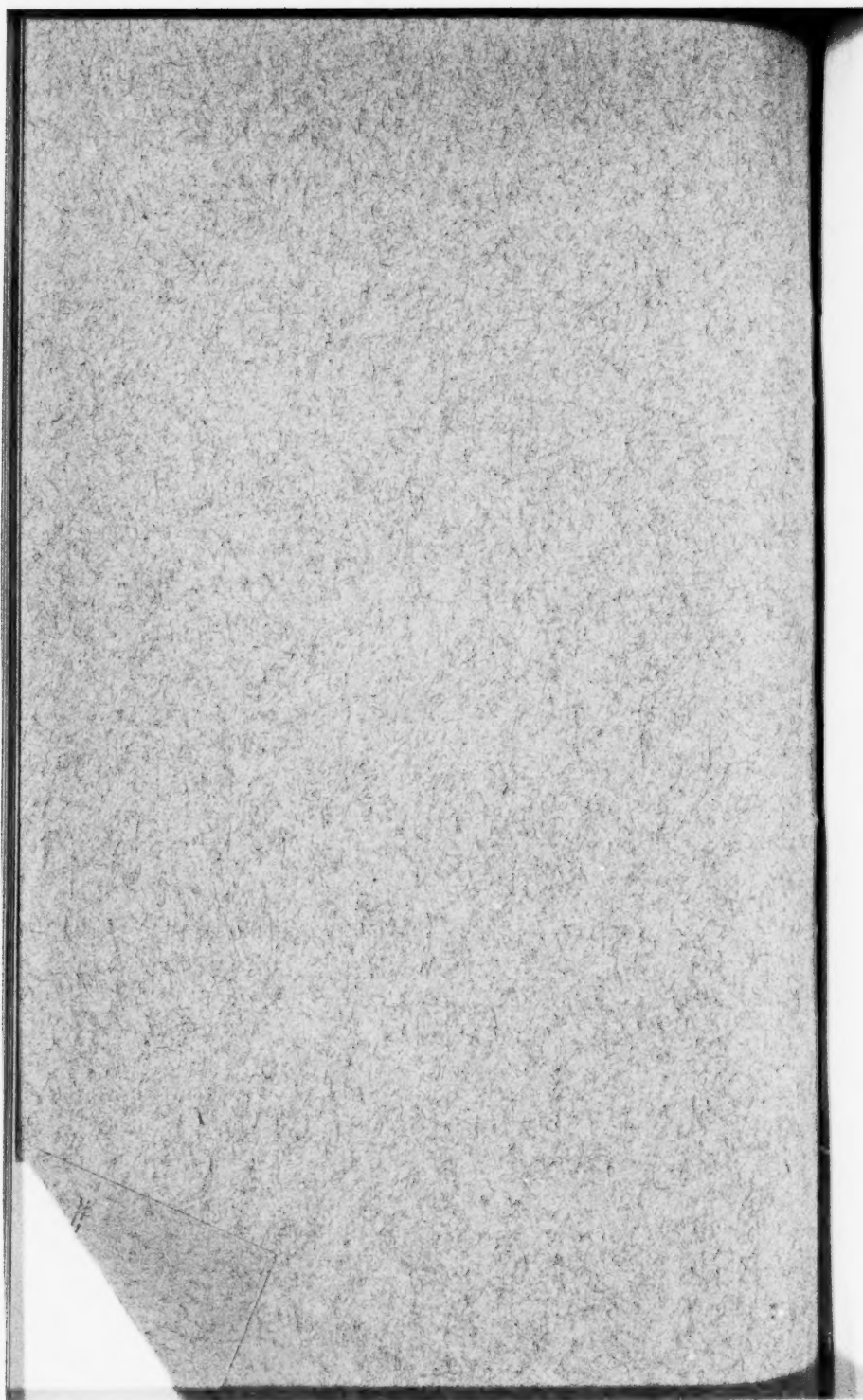
LAWRENCE E. SEXTON, AS TRUSTEE IN BANKRUPTCY, &C.,  
*Appellant,*

*against*

KESSLER & CO., LTD., ET AL.,  
*Respondents.*

AFFIDAVIT OPPOSING APPLICATION OF  
JOHN GORLOW TO INTERVENE.

JOHN LARKIN,  
*Counsel for Appellant.*



# Supreme Court of the United States. <sup>1</sup>

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.  
FLINSCH and WILLIAM K. GILLETT,  
composing the firm of Kessler &  
Company, Bankrupts.

LAWRENCE E. SEXTON, as trustee in  
bankruptcy of Alfred Kessler, Rudolf  
E. F. Flinsch and William K. Gillett,  
composing the firm of Kessler &  
Company, and the said Kessler &  
Company,

Appellant,

AGAINST

KESSLER & COMPANY, Limited, and  
FRANK YOUATT, Liquidator,  
Respondents.

No. 530.

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## **Affidavit of John Larkin in Opposi- tion to Gorlow's Motion to Inter- vene.**

STATE OF NEW YORK, { ss.:  
County of New York, }

JOHN LARKIN, being duly sworn, says that he re-  
sides in the City of New York, and is a member of

4 the bar of this Court. As solicitor for the petitioning creditors, deponent filed the petition in November, 1907, for adjudication of bankruptcy against Kessler & Co., and has acted as solicitor and counsel for the Receiver and for the Trustee in all the steps of this controversy since it was commenced before Peter B. Olney, Esq., the Referee in bankruptcy, continued before him as Master, came before the U. S. District Court on exceptions to his report, and before the Circuit Court of Appeals, 2d Circuit, on appeal, and is now counsel for the trustee in this Court herein.

The facts and circumstances out of which this controversy arose were briefly as follows:

- 5 For many years prior to 1907 the banking house of Kessler & Co., of New York (the bankrupt co-partnership), had had certain dealings with the Manchester, England, house of Kessler & Co., Ltd. (the respondent), and the Kesslers of each concern were members of a common family. These dealings consisted chiefly of the New York house selling drafts for 60 or 90 days (called "long drawings") upon the English house, and remitting funds to England before maturity to meet those drafts. The method of "securing" the English house for their acceptance of these drafts was for the New York house to set apart in an envelope or bundle (marked "Manchester escrow") certain of
- 6 their securities of various kinds, which always remained in the possession of the New York house and in their safe, and which were sold or hypothecated from time to time, and for which other securities were substituted, and were, in short, dealt with by the New York house just as freely as if the English house had not existed.

October, 1907, was the time of the financial panic in New York City and elsewhere, and during that month Henry Kessler, the head of the English concern, arrived in New York; after consulting with counsel he went to the New York house on October

25, 1907, and from it obtained possession of the 7 securities, then in the said envelope marked "Manchester escrow." Those securities included, among others, certain shares of stock in the Cripple Creek Central Ry. Co., which are the subject of the present application by Gorlow to intervene.

On October 30, 1907, the New York house assigned for the benefit of creditors, and immediately meetings were called and were held almost daily between the assignee, Mr. Williams, and Henry Kessler and his associates, and various persons represented by Henry Wollman, Esq., who were creditors of and claimants against the New York house for the said Cripple Creek shares.

The principal object of these meetings was to arrange that the English house should turn back the 8 securities which it had (as was declared) illegally seized, and thereupon to arrange with the assignee, Mr. Williams, for the disposition of a part of these securities in accordance with the desires and claims of the so-called Cripple Creek Railway Syndicate, which was composed of Henry M. Blackmer, president of the Cripple Creek Central Railway, and others, all represented by Henry Wollman, Esq. One of the most active participants in these conferences was the said Henry Wollman, Gorlow's counsel herein, who represented the members of the syndicate. These conferences were frequent for about two weeks and when it became apparent that 9 no agreement could be reached and that Mr. Kessler of the English House was about to depart with the securities in his possession, a petition in bankruptcy against the New York House and its individual members was filed. One of the three petitioning creditors was the Cripple Creek Central Railway, which executed and verified the same by John Gorlow, its secretary and treasury who now makes this application. When the petition was filed Lawrence E. Sexton was appointed temporary re-



10 ceiver and Henry Kessler was stayed from removing or disposing of the securities. The English House thereupon made a summary application to the U. S. District Court to determine the rights of the English House in the securities taken, and the matter was referred to Peter B. Olney, Esq., the referee in bankruptcy, and a petition and answer were filed with him and thereupon hearings began before him on November 26th, 1907, and continued sometimes from day to day, sometimes at frequent intervals and sometimes all day long for a period of about three months and a half, or until the middle of March, 1908.

11 The office of secretary and treasurer of the Cripple Creek Central Railway is filled by Mr. Gorlow, the petitioner. Almost continually during the progress of the hearings before the Referee deponent and others in his office were in communication with Mr. Gorlow and the Cripple Creek Railway, and with Mr. Wollman, the attorney for the syndicate, and who now appears for Mr. Gorlow as assignee of the members of said syndicate; and at all times he and the other parties mentioned herein were familiar with the course of the proceedings before the Referee. After some evidence had been taken, one J. & P. Coates, Limited, made application to the District Court to intervene, claiming superior rights to a part (other than the Cripple Creek Railway stock) of the securities; that application was granted, but only upon the express condition that it should be without prejudice to the proceedings already had before the Referee, and that all testimony and exhibits in the case should remain, and that the hearings should continue without any delay whatever or prejudice by reason of the intervention. But during all this time, although aware of the course of proceedings and the intervention of J. & P. Coates, Limited, neither Gorlow nor any of his assignors made any move to intervene. The testimony and

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exhibits in this case are very voluminous; the record 13  
in the Circuit Court of Appeals consisting of between  
1,100 and 1,200 printed pages.

The Referee sustained the receiver and trustee's  
position, holding that the delivery to Henry Kessler  
was a preference invalid under the bankruptcy act,  
and set it aside; and the District Court overruled all  
exceptions to the Referee's report and entered a  
decree setting aside the preferential transfer.

Even then no application to intervene was made;  
after the appeal by the English House from said  
decree, the very voluminous record was printed at a  
very large expense and elaborate briefs consisting of  
over 200 printed pages were submitted and the argu-  
ment before the Circuit Court of Appeals consumed 14  
nearly two days. Not until the Court of Appeals  
had reversed the decree, dismissed the trustee's claim,  
and the mandate had been entered in the District  
Court and an appeal to this Court had been taken,  
and assignments of error and supersedeas filed, and  
the record on appeal in this Court printed and filed,  
did Gorlow apply to intervene. He then made his  
application to the District Court, which was denied  
in the manner as stated in the moving papers,  
page 8.

Defendant submits that the petitioner is not now  
entitled to intervene. The evidence is all in and the  
case has been closed, and judgments of two courts  
have been rendered upon the issues raised by the 15  
parties to the proceeding. The order of the District  
Court denying the petitioner's motion to intervene  
sufficiently safeguards his rights, as upon the de-  
termination of the question of ownership as between  
the parties to the pending proceeding, the petitioner  
Gorlow may maintain against the successful party  
a plenary or summary action to determine the ques-  
tion of his ownership to the property in question, or  
may renew his application to the District Court for  
leave to intervene after the decision by this Court,

16 which right was expressly conferred upon him by order of said Court when his motion to intervene was denied.

Wherefore deponent asks that the application be denied.

JOHN LARKIN.

Subscribed and sworn to before  
me, a Notary Public, in and  
for the State and County of  
New York, this 15 day of  
April, 1910.

RALPH S. HULL,  
Notary Public,  
New York County.

(LS)

## Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee  
in Bankruptcy of ALFRED KESS-  
LER, RUDOLF E. F. FLINSCH and  
WILLIAM K. GILLETT, compos-  
ing the firm of Kessler & Com-  
pany and of said Kessler &  
Company,

Appellant,

*against*

KESSLER & Co., Limited, and  
FRANK YOUATT, Liquidator,  
Appellees.

October Term,  
1909.  
No. 530.

2

### Affidavit in Opposition to Motion of John Gorlow for Leave to Intervene *pro* *interesse suo.*

3

UNITED STATES OF AMERICA,  
Southern District of New York,    }  
City, County and State of New York, } ss.:

RUFUS W. SPRAGUE, Jr., being duly sworn, de-  
poses and says :

*First.*—He is a member of the firm of McLaugh-  
lin, Russell, Coe & Sprague, the solicitors of  
record in the above-entitled cause for the appel-  
lees, Kessler & Co., Limited, a corporation of  
Manchester, England, and Frank Youatt, Liqui-

- 4   dator thereof, and of counsel for them in this Court. He is acquainted with the facts herein and makes this affidavit, as neither said Frank Youatt, Liquidator, nor any officer or agent of said Kessler & Co., Limited, capable of making this affidavit, is now within the United States.

*Second.*—Deponent denies the allegations in the affidavit of John Gorlow in the motion papers on pages 3 and 4 thereof that on October 25th, 1907, Frank E. Havemeyer and the other persons mentioned were the “owners” of four  
5   hundred sixty-six (466) shares of preferred stock and three hundred (300) shares of common stock of the Cripple Creek Central Railway Company and of the certificates representing the same, and that the said stock and said certificates are the same stock and the same certificates involved in this cause and alleges that said certificates were lawfully deposited with the appellees by the bankrupts as security for advances.

*Third.*—Deponent denies the allegations in the affidavit of said Gorlow set forth on page 4 of the  
6   moving papers, that said stock and said stock certificates were deposited by “said owners” with Kessler & Company, bankers, as custodian, and without any power or authority on the part of Kessler & Company to transfer or dispose of the same.

*Fourth.*—Deponent denies the allegations contained in the affidavit of said Gorlow set forth on page 4 of the moving papers, that on or about October 25th, 1907, Kessler & Co., without any right or authority transferred and delivered the certificates representing said seven hundred sixty-six (766) shares of stock to Kessler & Co., Limited, of Manchester, England.

*Fifth.*—Deponent denies each and every allegation 7  
 contained in the last paragraph of the  
 affidavit of said Gorlow set forth on page  
 9 of the moving papers, except that deponent  
 admits that on or about November 8th, 1907,  
 the claim to the ownership of the seven hundred  
 sixty-six (766) shares of Cripple Creek stock,  
 referred to in said affidavit, was made against  
 Kessler & Co., Limited, and later against the  
 Liquidator of said corporation, and that demand  
 for the surrender of said stock was made on or  
 about that time by Henry Wollman, Esq., counsel  
 for the petitioner herein and others, which demand 8  
 was refused.

*Sixth.*—From the time of such refusal, on or  
 about November 8th, 1907, until on or about  
 November 17th, 1909, after this cause came regularly  
 on the calendar of this Court on appeal,  
 neither the said Gorlow nor any of his alleged  
 assignors, nor any of the alleged "owners," nor  
 any other person, made any motion or took any  
 steps in this cause or otherwise for the enforcement  
 of the claim alleged in Gorlow's affidavit  
 against this Cripple Creek stock. 9

*Seventh.*—The said certificates of Cripple Creek  
 stock, together with the other property which the  
 appellant sought to recover in this suit, were on or  
 about the 25th day of October, 1907, placed in a  
 safe deposit box in the vaults of the Hanover Safe  
 Deposit Company in the City of New York, and  
 the said certificates of Cripple Creek stock have  
 since remained and are now in the said safe deposit  
 box.

*Eighth.*—Deponent denies the allegations contained  
 in said affidavit of Gorlow set forth on pages  
 4 and 5 of the moving papers that this cause is

- 10 part of the bankruptcy proceedings of Kessler & Company, and that the issues herein were tried before Honorable Peter B. Olney, as Referee in Bankruptcy, or as Special Master, to determine the same, and alleges that this cause is a plenary suit in equity presenting new and independent issues (see Transcript of Record, p. 40).

- Ninth.*—Deponent denies the allegations contained in said affidavit of Gorlow, set forth on pages 5 and 6 of the moving papers, that the order therein, which appears in the transcript of record, pages 1109,  
 11 1112, was made in order to obviate the necessity of an appeal bond, and alleges that said order was entered on the 14th day of December, 1908, at the foot of the decree herein of the District Court for the Southern District of New York, entered on the 4th day of December, 1908, on the motion of the appellees herein and with the consent of the appellant for the purpose of restraining the appellant from disposing of the property therein mentioned pending the appeal to the Circuit Court of Appeals, Second Circuit, without the consent of the appellees, and to lessen the amount of the bond which  
 12 would be required to obtain a supersedeas of said decree of December 4th, 1908, which supersedeas was afterwards granted (see Transcript of Record, p. 1122).

*Tenth.*—The appellees, Kessler & Co., Limited and Frank Youatt, Liquidator, were not parties to the agreement set forth in the affidavit of said Gorlow on pages 6 and 7 of the motion papers.

*Eleventh.*—The mandate of the Circuit Court of Appeals on its decree of reversal (Transcript of Record, p. 1145) was filed in the District Court for the Southern District of New York, and a final decree dismissing the bill of complaint on the merits

was entered on said mandate in said District Court 13  
on or about July 6, 1909.

*Twelfth.*—Deponent denies that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in the affidavit of said Gorlow set forth on page 7 of the moving papers that all of “said owners” except certain persons therein named assigned to the petitioner, John Gorlow, their interests in said seven hundred sixty-six (766) shares of Cripple Creek stock and the certificates representing the same.

RUFUS W. SPRAGUE, Jr.

14

Subscribed and sworn to }  
before me this 15th day }  
of April, 1910. }

ROBERT P. SMITH,  
Notary Public,

[NOTARY'S SEAL.] Westchester County,  
New York.

Certificate filed in New York County, N. Y.

15



FILED.  
APR 16 1910

JAMES H. MCKENNEY

## Supreme Court of the United States.

LAWRENCE E. SEXTON, AS TRUSTEE  
IN BANKRUPTCY OF ALFRED KESS-  
LER, RUDOLF E. F. FLINSCH  
AND WILLIAM K. GILLET, COM-  
POSING THE FIRM OF KESSLER &  
COMPANY AND OF SAID KESSLER  
& COMPANY,

*Appellants,*

*against*

KESSLER & CO., LIMITED, AND FRANK  
YOUATT, LIQUIDATOR,

*Appellees.*

No. ~~2000~~ 8

October Term,  
1909.

### APPELLEES' BRIEF IN OPPOSITION TO JOHN CORLOW'S MOTION TO INTERVENE, ETC.

ABRAM I. ELKUS,  
FREDERICK C. McLAUGHLIN,  
RUFUS W. SPRAGUE, Jr.,

*Counsel.*

## Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee  
in Bankruptcy of ALFRED KESS-  
LER, RUDOLF E. F. FLINSCH and  
WILLIAM K. GILLETT, compos-  
ing the firm of Kessler & Com-  
pany and of said Kessler &  
Company,

*Appellants,*

*against*

KESSLER & Co., Limited, and  
FRANK YOUATT, Liquidator,  
*Appellees.*

October Term  
1909.  
No. 530.

### **APPELLEES' BRIEF IN OPPOSITION TO JOHN GORLOW'S MOTION TO IN- TERVENE, ETC.**

#### **Nature of Principal Suit.**

This cause (Number 530, October Term, 1909), is an appeal from a decree entered on a unanimous decision of the United States Circuit Court of Appeals for the Second Circuit, on June 9, 1909, reversing a decree in equity of the United States District Court for the Southern District of New York, entered on December 4, 1908.

On November 8th, 1907, a petition in bankruptcy was filed against the New York copartnership of Kessler & Company and its individual members under which an adjudication of bankruptcy was had and the appellant appointed trustee.

At the time the petition was filed the appellee Kessler & Co., Ltd., an English corporation with its principal place of business at Manchester, England, of which the appellee Frank Youatt is now the liquidator in voluntary liquidation, had accepted drafts drawn on it by the bankrupts and sold by the bankrupts in New York to the amount of about £80,000, which were then outstanding (Transcript, pp. 1037, 1039).

As security to the appellee for this liability (on which the appellees have so far paid seventy-five per cent.) the bankrupts had set aside certain stocks, bonds, notes, certificates and real estate deeds, which it held as the property of the appellee, and which are referred to throughout the correspondence between the Manchester and New York concerns as the "Escrow" and "Special Escrow" of Kessler & Co., Ltd. (Transcript, p. 1005 ff, p. 1133).

On October 25, 1907, a few days before the bankruptcy petition was filed, the actual possession of these so-called "Escrows" was given over by the bankrupts to the said appellee, pursuant to the written agreement under which they had been set aside since June, 1903 (Transcript, pp. 1005, 1015, 1134).

The appellant as trustee in bankruptcy immediately brought a plenary suit in the said United States District Court against the appellees, alleging that this delivery on October 25, 1907, was a voidable preference, and praying that it be set aside and the property turned over to him as Trustee. *This was the ordinary suit under Section 60 of the*

*Bankrupt Act, as amended in 1903* (Transcript, pp. 40, 41, 42).

At the beginning of the suit, in fact immediately upon the filing of the petition on November 8, 1907, the appellees were enjoined from disposing of the property.

The issues were referred to a Master in Chancery to take the testimony and report (Transcript, pp. 40, 41, 42). His report was filed on April 30, 1908, in favor of the appellant (Transcript, p. 998). This report was confirmed by the District Court, and a decree was entered in that Court on December 4, 1908, setting aside said alleged transfer and directing the appellees to turn over the property to the appellant as trustee (Transcript, p. 1095).

An order, dated December 14, 1908, was entered at the foot of this decree, directing the appellant to hold the property where it then was pending the appeal which was taken by the appellees to the Circuit Court of Appeals for the Second Circuit (Transcript, p. 1109).

Appeal by the appellees to the Circuit Court of Appeals resulted in a unanimous reversal, Circuit Judges Ward and Noyes writing separate opinions, and Circuit Judge Lacombe concurring with Judge Noyes. The appellant has, as above stated, appealed to this Court. The cause has been on the calendar of this Court since July 16, 1909.

### **Not an action *in rem*.**

The United States District Court never assumed jurisdiction over the property which is the subject of this suit, further than to enjoin the appellees from disposing of the same. The action was *in personam*. The relief demanded was that the alleged transfer be set aside and that the appellees turn over the property. The decree (Trans-

cript, p. 1095) in the District Court (now reversed) followed this prayer for relief.

This cause is a plenary suit in equity originating in a District Court, commenced by the appellant, as Trustee aforesaid, to recover personal property in the possession of the appellees on the ground of an alleged transfer to the appellees by the bankrupts of said property, constituting a voidable preference. It is therefore not a bankruptcy proceeding but is a suit involving independent issues and claims of title.

*Hewitt vs. Berlin Machine Works,*  
194 U. S., 296;

*Knapp, as Trustee, vs. Milwaukee Trust Co.,* opinion rendered March 7th, 1910, No. 206, October Term, 1909, this Court.

At the beginning of the litigation the appellee Kessler & Co., Limited, was in possession of the property under a claim of title, and never surrendered that possession until compelled to do so by the final decree of the District Court, which has been reversed.

### **Jurisdiction not Exclusive.**

The fact that one of the parties to this plenary suit happened to be a trustee in bankruptcy, is the real basis for petitioner's assertion that the property is in the custody of the Court. But this fact does not make the suit one *in rem*.

This property has never been seized by judicial process. The trustee was not in possession of it when suit was commenced. The suit is not one to enforce a lien against specific property, to marshal assets, administer trusts, foreclose a mortgage nor a suit of a similar nature. Neither the Court be-

low nor this Court has ever assumed control or possession of the property and never could be required to do so in this suit. This is the fundamental distinction between the case at bar and the authorities cited on petitioner's brief.

**The Order of December 14, 1908 (Transcript, p. 1109).**

This was an order entered at the foot of the decree of December 4, 1908, above mentioned. It was made and entered at the instance and request of the appellees. It merely restrained the appellant, to whom the erroneous final decree had directed possession be given, from disposing of the property without the consent of the appellees, pending the appeal to the Circuit Court of Appeals from that decree. *In its nature and effect it was a supersedeas order made also partly for the purpose of relieving the appellees from the necessity of giving a very large bond.* The property was then in the possession of the appellant as trustee merely because he had sued for and recovered it, not because the District Court in this suit ever assumed any jurisdiction over the *res*.

**The Appellees' Right to the Cripple Creek Stock.**

Cripple Creek stock was first put into the appellee, Kessler & Co., Ltd's "Escrow" on October 14, 1904 (Transcript, p. 902). It remained there until September 14, 1906 (*Id.*, pp. 908, 915, 917, 918, 923, 925). It was actually produced for inspection by the agent of the appellee on June 1st, 1905 (*Id.*, pp. 914, 915). On September 23, 1907, and October 21, 1907, the identical certificates in question were substituted for other colla-

teral in the so-called "Special Escrow" to secure acceptances of drafts drawn on the appellee on August 27, 1907, amounting to £20,000 (*Id.*, pp. 934, 935). These identical certificates of Cripple Creek stock in question were issued *in May and August, 1906*, in the name of George Meyer and Albert Katt respectively, employees of the bankrupts, and were endorsed in blank by them and by the bankrupts immediately upon their issue, and were placed in the "Escrow" as security for the advances, as above stated (*Id.*, p. 982).

### **The Petitioner's Claim to the Cripple Creek Stock.**

The petitioner merely asserts that his assignors and a number of other people, whom he seeks to have joined as parties to the intervention, were "for a long time before and on October 25, 1907," the "owners" of this identical stock, and had deposited it with the bankrupts as mere custodians (*Moving Papers*, pp. 3-4). Later on, however, he refers to the so-called "owners" as "paid up participants," thus strongly suggesting a stock syndicate of which the bankers were the managers (*Moving Papers*, pp. 6 and 7). There was, in fact, such a syndicate. *The petitioner does not disclose the nature and terms of this syndicate agreement, nor does he state anywhere the terms and conditions upon which the bankrupts were permitted by these so-called owners to have the custody and possession of stock certificates issued in the names of their own employees and endorsed in blank.* The ordinary syndicate agreement permits the syndicate managers to borrow upon the syndicate stock. The only statement by the petitioner of his alleged cause of action, is the *conclusion*, unsupported by any reference to the essential and

material facts, that the bankrupts had no power or authority to transfer or dispose of this stock (Moving Papers, p. 4). He does not even allege that his assignors were the owners as early as *May, 1906*, when the stock was issued and endorsed as above stated.

### **The Petitioner's Contract with the Appellant as Trustee in Bankruptcy.**

After the Master filed his report on April 30th, 1908 (Transcript, p. 998), the petitioner's assignors applied to the District Court sitting in bankruptcy for confirmation of an agreement with the appellant as trustee in bankruptcy which provided in substance that if the appellant is finally successful in this suit against the appellees, he will turn over to them this small amount of Cripple Creek stock (Moving Papers, p. 7). The appellees were not parties to this agreement.

It appears, therefore, that the petitioner seeks to have this long and expensive litigation reopened for the purpose of trying out a moot question, namely, whether in the contingency that the appellant is finally unsuccessful in this litigation, the appellees should be required to surrender this Cripple Creek stock to him.

### **The Petitioner's Election to Await the Determination of this Suit.**

Upon his own showing, the petitioner and his assignors have deliberately elected not to intervene in this suit. They have made their application to the District Court below for the relief which they desired, as long ago as September 16, 1908 (Moving Papers, p. 7), when they had their agreement with the appellant confirmed.



Since the making of that contract they have patiently stood by and watched the progress of the suit. Now the petitioner has changed his mind. Having deliberately and intentionally waited for two and one-half years, and having made his election he now asks this Court to re-open this long and expensive litigation and to bring in third parties, who may be aliens and non-residents, in order that he may try out his claim against appellees to this small amount of stock.

**The petitioner has never been deprived of his right to pursue his remedies against appellees.**

On November 8th, 1907, the day the bankruptcy petition was filed, the bankruptcy court made an *ex parte* order appointing the appellant receiver in bankruptcy, which order restrained the transfer of this property by appellees (Transcript, pp. 2, 7). This was before the principal suit had been commenced. This order was not directed to the petitioner and neither restrained the petitioner nor deprived him of any right or remedy he may have had against appellees.

The petitioner has never asked any court to relieve him from any disability which might be predicated upon that order. Never during the entire course of the litigation in the District Court did he attempt to pursue any remedy. He does not specify any remedy which he might have pursued, of which he has been deprived in any manner. These Cripple Creek certificates have, since November 8, 1907, been in the Hanover Safe Deposit Company of the City of New York and are there now (Affidavit of Sprague herewith submitted), and if by any possibility any order of the District Court prevented the petitioner during the

pendency of this litigation in the District Court from bringing a separate action in any court of competent jurisdiction for their recovery, no opposition would have been made by anyone to a motion to modify such order, and it is apparent that such motion would have been readily granted. The purpose of the injunction order above mentioned was obviously to restrain the transfer of the property by the appellees. It was never intended to restrain the petitioner or any other person from enforcing in any suitable manner a claim to the property.

**The petitioner asks for a most extraordinary remedy.**

He seeks an order of this Court not only allowing him to intervene (Moving Papers, p. 2), but which shall bring in as parties strangers to the record over whom this Court has no jurisdiction. This Court not having taken possession of the *res* cannot adjudicate the rights of persons not parties to the suit.

He further asks for a trial of his claim before some Master or Commissioner to be appointed by this Court. This is not an original suit in this Court. No authority is given by the petitioner allowing this Court to become original triers of fact on an appeal.

**The suit being in personam and not in rem, and the Court not having taken possession of the property by any process, there can be no intervention.**

The principle just stated is firmly established by the following authorities:

*Coleman vs. Martin*, 6 Blatchford,  
119, 120;

*Merritt vs. American, etc., Co.*, 79 Fed., 228;

1 *Foster's Federal Practice*, 4th Ed., pages 670, 671, and cases cited;

*Fletcher's Equity Pleading & Practice*, page 79, Section 55;

Even the fact that parties to a litigation have consented that property or funds may be subject to their control or remain in the custody of a court pending the final outcome of the litigation does not authorize an intervention.

*Stillman vs Combe*, 197 U. S., 436.

**The petition should be denied in any event because of the petitioner's gross laches.**

Assuming that this Court, when the cause is on appeal before it, could grant leave to intervene, the petitioner is barred of his right, if any, to such intervention by reason of his gross laches and unreasonable delay in making application. The motion papers (pp. 6 and 7) show that the petitioner and his assignors had full knowledge of this suit from its beginning in November, 1907, and made no move until November, 1909 (Affidavit of Sprague herewith submitted). Nearly a thousand printed pages of testimony were taken before the Master; his voluminous report was filed; printed briefs were submitted and lengthy arguments had in the District Court on the motion to confirm the report; the decision of the District Court was rendered and a decree was entered thereon in favor of the appellant as trustee; an appeal to the Circuit Court of Appeals was allowed and perfected, and a lengthy record was printed and filed; exhaustive briefs were again submitted and the case argued at length

before the Circuit Court of Appeals; a decision unanimously reversing the District Court was rendered, and a decree dismissing the complaint on the merits was entered on the mandate; a further appeal to this Court was allowed and perfected; again the voluminous record was printed and was filed in this Court in July, 1909; and the case had been regularly on the calendar of this Court for almost five months before the petitioner made his first motion for intervention.

*The petitioner and his attorney watched the progress of this litigation for two years through the lower courts and never made a motion. Then they filed a petition in the District Court for leave to intervene, which was promptly denied for want of jurisdiction. The petitioner then waited almost four months more and now files his petition in this Court for leave to intervene and to bring in as parties to the intervention other persons not parties to the suit.*

This is not a suit originating in this Court, and such delay on the part of the petitioner is unreasonable and constitutes laches, barring the petitioner of his right, if any, to intervene.

*Bronson vs. R. R. Co.*, 2 Black, 524, 528, 532;

2 *Street Federal Equity Practice*, Section 1373, p. 835;

*United States vs. Northern Securities Co.*, 128 Fed., 808, 810, by Thayer, J., seemingly approved in *Harri- man vs. Northern Securities Co.*, 197 U. S., 244, 289;

*Central R., etc., Co. vs. Farmers Loan, etc., Co.*, 112 Fed., 81;

*Continental Trust Co. vs. Toledo, etc., Co.*, 82 Fed. Rep., 642;

*11 Ency. of Pleading & Practice*, p. 504, and cases cited ;  
*Blatchford vs. Newberry*, 100 Ill., 484 ;  
*Gunderson vs. Ill. Trust, etc., Co.*, 100 Ill. App., 461, 471, affirmed 199 Ill., 422.

In *Beach Modern Equity*, Section 579, it is stated, "A petition filed at a late stage of the case may properly be dismissed on the mere ground of delay."

*Smith vs. Gale*, 144 U. S., 509, 520.

In the case last cited, even where a right to intervene was granted by the Dakota Code on filing a complaint with leave of Court, this Court on appeal said (p. 520) :

"By Section 90 of the Code above cited such complaint must be filed by leave of the Court, a limitation on the right to intervene which presupposes a certain amount of discretion in the suit. Such right ought to be claimed within a reasonable time and may properly be refused in a case like the present one where the action has been pending two years and was about to be tried (*Hocker vs. Kelley*, 14 California, 164)."

The same principle should apply in considering a motion for intervention as when leave is asked to file a cross-bill to grant or refuse which is in the discretion of the Court. The courts generally disapprove of the filing of a cross-bill if the original suit has been heard and the merits have been passed on.

*Hough vs. Bidwell*, 151 Fed. (C. C. A.), 563, 566, citing *Bronson vs. Ry. Co.*, *supra*, *Morgans Co. vs. Texas Central Ry. Co.*, 137 U. S., 171, 201.

**Intervention will not be allowed in an appellate court.**

There are not many cases where intervention has been sought in an appellate court of last resort but the principle just stated is established by the following:

"A petition to intervene in an equitable proceeding comes too late after the case has been appealed."

*11 Encyc. Pl. & Pr.*, 504, citing  
*Blatchford vs. Newberry*, 100 Ill.,  
484, 492.

In the case last cited the Supreme Court of Illinois held, *per curiam*, when the Attorney-General of Illinois sought to intervene in the Appellate Court and asked for a new hearing on the ground that public interests were involved, as follows (pp. 492-493):

"We are of opinion that in a case brought here by appeal, none save such as are parties to the record in this court have a right to be heard. If the interests of the public be such that the Attorney General may properly intervene in this litigation, we think such intervention must begin in the court of original jurisdiction and cannot be allowed here."

See also

1 *Foster*, 4th Ed., page 667, citing  
*U. S. vs. Northern Securities Co.*,  
*supra*;  
*Bronson vs. Ry. Co.*, 2 Black, 524,  
528, 532.

In the case last cited this Court said as follows (p. 528):

"If the general creditors of a mortgagor

were suffered to intervene in an appellate tribunal, this Court would become the triers of questions of fact outside the record, and that too on *ex parte* affidavits—by no means the best mode of ascertaining the truth.”

**The cases cited by the petitioner do not warrant the granting of his motion.**

This is clear upon the examination of them, to wit :

*Farmers Loan & T. Co. vs. Lake St. Elevated R. Co.*, 177 U. S., 51 (Petitioner's Brief, p. 5), simply holds that where the Federal Court has first entertained jurisdiction of a bill to foreclose a mortgage, the State Court has no jurisdiction to entertain a similar suit affecting the same property.

*Wabash R. Co. vs. Adelbert College*, 208 U. S., 609 (p. 6, Petitioner's Brief), simply decided that where a Federal Court had commenced a foreclosure action, the State Court couldn't thereafter sell the property to satisfy certain liens.

*Bronson vs. LaCrosse, etc., R. Co.*, 1 Wall., 405 (p. 7, Petitioner's Brief), simply decides that where the Court is foreclosing a railroad and an appeal is taken from the decree, the lower Court may adopt all proper and judicious measures to protect the property from waste and loss, but beyond this should not deal with the property and all questions of the other use of the revenue should be reserved for such disposition as a final decree on appeal may make.

*Krippendorf vs. Hyde*, 110 U. S., 76 (cited on p. 9 of Petitioner's Brief), holds that where a United States Marshal has taken possession under writ from the United States Court of certain property which a third person claims to own, the latter

may intervene in the suit while it is pending in the Circuit Court.

The other cases cited by petitioner are not at all in point on intervention in this suit in this Court.

### **CONCLUSION.**

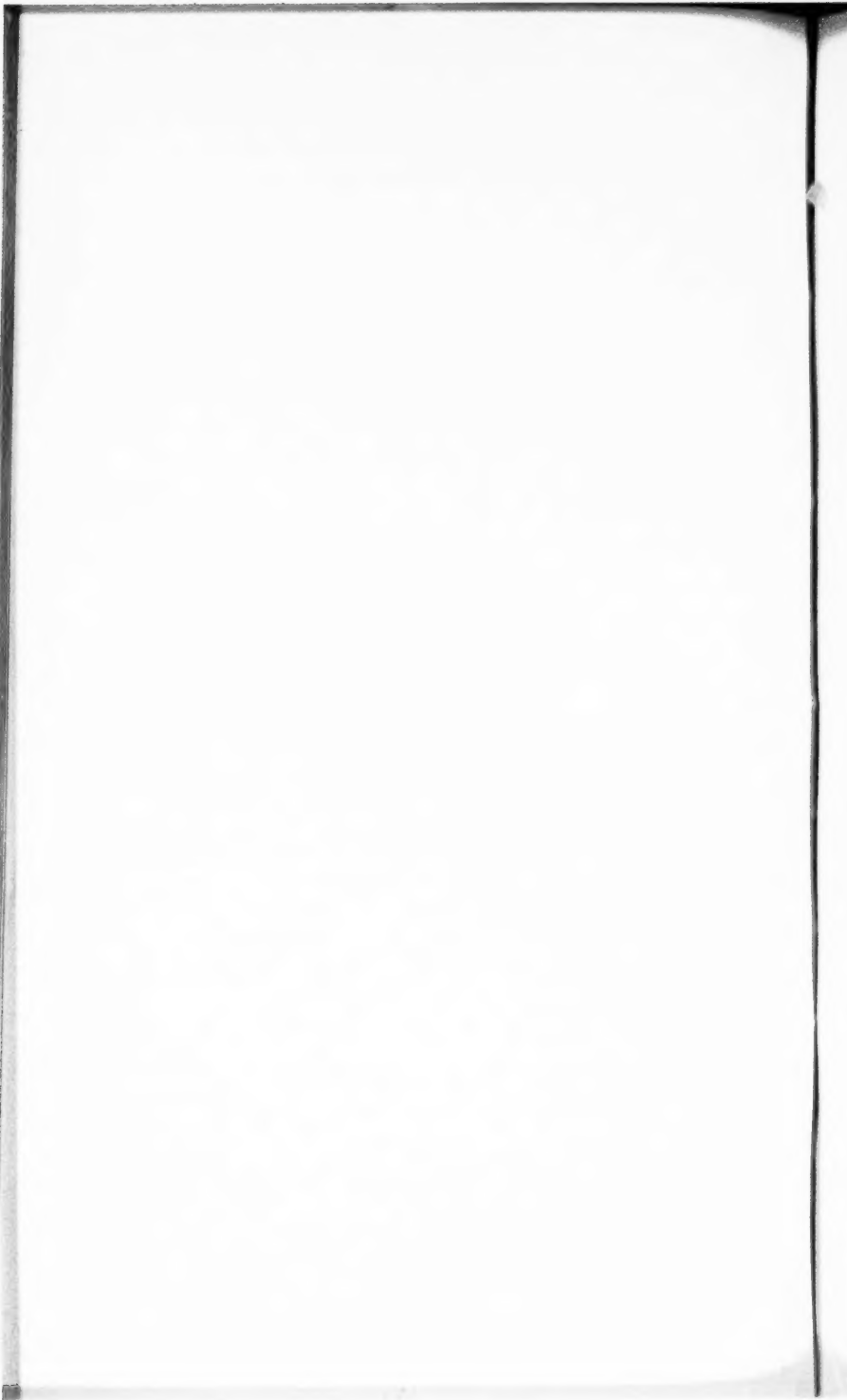
**We respectfully submit that the petition for intervention should be denied for the reasons and upon the authorities above set forth.**

Dated April 15, 1910.

Respectfully submitted,

ABRAM I. ELKUS,  
FREDERICK C. McLAUGHLIN,  
RUFUS W. SPRAGUE, Jr.,  
Of Counsel for Kessler & Co.,  
Limited, and Frank Youatt,  
Liquidator, Appellees.





Office Supreme Court U. S.  
FILED

APR 18 1910

JAMES H. MCKENNEY,  
Clerk

## Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee  
in Bankruptcy of Alfred Kessler,  
Rudolf E. F. Flinsch, and  
William K. Gillett, composing  
the firm of Kessler & Company,  
and of the said Kessler & Company,

*Appellant.*

No.  9

*vs.*

KESSLER & COMPANY, Limited, and  
FRANK YOUATT, Liquidator,

*Respondents.*

### **BRIEF IN SUPPORT OF JOHN GORLOW'S MOTION TO INTER- VENE, &c.**

Petitioner, John Gorlow, claims 766 shares of the capital stock of The Cripple Creek Central Railway Company which is a part of the securities in controversy between the appellant and respondents in this suit. The certificates for this stock are in the custody of an officer of the District Court for the Southern District of New York in this case.

This petitioner applied to the District Court for leave to intervene, but his application was denied on the ground that that Court, by reason of the appeal of this case to this Court, had lost its jurisdiction, &c., &c.

This is a motion for an order allowing the petitioner to intervene here with reference to said stock and, inasmuch as it will be impracticable for this Court to try the issues between the petitioner and the parties to this suit, this Court is asked to direct the District Court, now in physical control of the property, or a Master to be appointed by this Court to hear the claim of this petitioner to said stock, &c., &c.

That this petitioner is entitled to such an order will be evident from a statement of the facts as they appear in the moving papers and in the printed Transcript of Record in this case.

The petitioner claims the stock adversely to the appellant and respondents and his title to the stock cannot be affected in the slightest by the decision which will be rendered by this Court in this case.

Kessler & Company, bankers of New York, were custodians for the petitioner's assignors, and for Taylor, Smith & Evans, George E. Fry and Mrs. E. Von Neufville (all being hereinafter referred to as "the owners" of said 766 shares of Cripple Creek Central Railway Company stock), without any authority to dispose of the same.

Nevertheless, Kessler & Company transferred and delivered said stock with nearly two million dollars of other stock and securities, all of which are the subject of litigation in this suit, to Kessler & Company, Limited, an English corporation (page 1095, Transcript of Record herein). Shortly thereafter, Kessler & Company were put into bankruptcy and Lawrence E. Sexton was appointed Receiver.

Sexton, then Receiver, made claim to all the securities delivered by Kessler & Company to Kessler & Company, Limited, claiming that the

transfer was an unlawful preference under the Bankruptcy Act. Kessler & Company, Limited, filed a petition in said District Court in which the bankruptcy proceeding was pending, demanding that the Receiver's claim be sent to a Special Master to determine the same on the merits (page 2, Transcript of Record herein). Issues between Sexton on one side and Kessler & Company, Limited, and Frank Youatt, who had been appointed liquidator of that Company, on the other side, were framed and submitted to Peter B. Olney, Esq., Referee in Bankruptcy, sitting as Special Master. Evidence was adduced by both sides. A decree awarding all the securities to Sexton, as Trustee in Bankruptcy, to which position he had in the meanwhile been elected, was entered (page 1095, Transcript of Record herein).

The English corporation and its liquidator appealed to the Circuit Court of Appeals, but in lieu of an appeal bond, they, pursuant to an order of the District Court, turned over to Sexton, as Trustee, all the securities, including said Cripple Creek Railway stock, the same to be held by him as an "officer of said District Court" (p. 1109 Transcript of Record herein). By that order, the Trustee "as such officer", was given power to collect dividends, and in fact was given all the powers that are usually granted to a receiver. The decree in favor of the Trustee was reversed. The Trustee appealed to this Court (this cause, No. 530, being the appeal), where this case is now pending.

A supersedeas was granted by Judge Lacombe, staying the execution of the decree of the Circuit Court of Appeals.

Quite a few persons claimed a lien upon or

some interest in this Cripple Creek Railway stock. Finally all such claimants (not including Kessler & Co., Ltd., or Youatt), formally released their alleged claims against the stock to Gorlow's assignors and the other "owners." Thereupon, an order was entered by the Bankruptcy Court that this Cripple Creek stock should be turned over by the Trustee in Bankruptcy to Gorlow's assignors and the other "owners", if it should be received by the trustee, but that this should not affect the right of those parties to bring such suits and proceedings as they saw fit for the recovery of the stock (p. 7, Moving Papers). This order was entered by the Bankruptcy Court after the report of Olney as Master in Chancery in this suit in favor of the trustee in bankruptcy was filed.

Thereafter, all "the owners" except Taylor, Smith & Evans, George Fry and Mrs. Von Neufville assigned to petitioner Gorlow their rights in and claims to said stock.

Gorlow thereupon filed his motion to intervene in the District Court showing that he and said Taylor, Smith & Evans, Mrs. Von Neufville and Fry were entitled to the 766 shares of the Cripple Creek stock.

In denying the petitioner's motion, District Judge Hough (p. 8, Petitioner's Moving Papers herein), took the position that although the District Court may have had power to make a lawful order directed to the custodian, for the preservation of the property, yet an appeal having been taken to this Court, that Court was without jurisdiction to grant the relief prayed for by Gorlow. Judge Hough entered an order denying Gorlow's motion, giving the petitioner, however, "leave to renew in the event only of the ultimate

order of the Supreme Court of the United States conferring upon this Court any further powers that those above enumerated in respect of this cause" (pp. 8, 9, Petitioner's Moving Papers herein).

### BRIEF.

**This Court having acquired jurisdiction by appeal of the subject matter of the litigation, no other Court, whether State or Federal, now has any power to entertain any suit or proceeding with reference thereto.**

Where a Court, State or Federal, has once acquired jurisdiction over a controversy concerning property, and has actual possession of it, or has not taken possession but might be compelled to assume possession or control over it to effectuate its decree, no other Court has the power to entertain any action or proceeding with reference to it.

*Farmers' L. & T. Co. vs. Lake St. Elevated R. Co.*, 177 U. S., 51 (41 L. Ed., 667), 1900.

SHIRAS, J.

(p. 671.) *The possession of the res vests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other Courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between Courts whose jurisdiction embraces the same subjects and persons.*

"Nor is this rule restricted in its application to cases where property has been actu-

ally seized under judicial process before a second suit is instituted in another Court, but *it often applies as well* where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature *where, in the progress of the litigation the Court may be compelled to assume the possession and control of the property to be affected.* \* \* \* *Peck vs. Jenness*, 7 How., 612; 12 L. Ed., 841, *Freeman vs. Howe*, 24 How., 450; 16 L. Ed., 749; *Moran vs. Sturges*, 154 U. S., 256; 38 L. Ed., 981; 14 Sup. Ct. Rep., 1019; *Central Nat. Bank vs. Stevens*, 169 U. S., 432; 42 L. Ed., 807; 18 Sup. Ct. Rep., 403; *Harkrader vs. Wadley*, 172 U. S., 148; 43 L. Ed., 399; 19 Sup. Ct. Rep., 119."

*Buck vs. Colbath*, 3 Wall., 334; 18 L. Ed., 257.

MILLER, J.

(p. 360.) "That principle is, that whenever property has been seized by an officer of the Court, by virtue of its process, the property is to be considered as in the custody of the Court, and under its control for the time being; and that no other Court has a right to interfere with that possession *unless it be some Court which may have a direct supervisory control over the Court whose process has first taken possession, or some superior jurisdiction in the premises.*"

See also

*Wabash R. Co. vs. Adelbert College*, 208 U. S., 609;

*Murphy vs. John Hofman Co.*, 211 U. S., 562; 53 L. Ed., 327.

**Neither the District Court nor the Circuit Court of Appeals, after the appeal to this Court, had any jurisdiction to make any order, except for the preservation of the property from waste or loss. This Court is the only tribunal that can make an order allowing the petitioner to intervene or to assert his claim of ownership.**

*Bronson vs. The La Crosse & Milwaukee R. Co.*, 1 Wall., 405; 17 L. C. Reps., 616, 617;

*Grant vs. Phoenix Mut. Life. Ins Co.*, 121 U. S., 118.

**The petitioner after the appeal to this Court, could obtain no relief in the District Court. If the District Court entertained an intervening petition, it might be compelled to disregard the mandate of this Court which it was bound to execute.**

*Sibbald vs. The United States*, 12 Peters, 488, 489; 9 L. Ed., 1167.

(p. 1169.) "When the Supreme Court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the Court below to award it. (21 Sec., Judiciary Act, 1 Story's Laws, 61). Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior Court is bound by the decree as the law of the case and must carry it into execution according to the mandate. They



cannot vary it, or examine it, for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded."

*In re Potts*, 166 U. S., 263; 41 L. Ed., 994,

Gray, J.,

(p. 996.) "The decree entered by the Circuit Court presently after receiving the mandate, setting aside its former decree, and adjudging that the letters patent were valid and had been infringed, referring the case to a master for an account of profits, and awarding a perpetual injunction, was, as it purported to be, in conformity with the mandate of this Court. But the subsequent orders of the Circuit Court, entertaining and granting the petition for a rehearing, without previous leave obtained from this Court for the filing of such a petition, were irregular and unauthorized, based upon a misunderstanding of the mandate, and in practical though, unintentional, disobedience of the command thereof that further proceedings be had in conformity with the opinion of this Court. Upon the record as it stands, a clear case is shown for issuing a writ of mandamus to set aside those orders, and to execute the mandate according to what appears to this Court to be its manifest meaning and effect.

"Upon the question whether an application for leave to file a petition for a rehearing in the Circuit Court could and should be entertained by this Court, at the present stage of the case, no opinion is expressed, because no such application has been made.

"Unless such an application shall be made to this Court within twenty days, and shall upon consideration be granted by this Court, an order will be entered that the writ of mandamus issue as prayed for."

See also

*Ex parte Dubuque & Pacific Railroad Co.*, 1 Wall., 69; 17 L. Ed., 511.

**This Court has acquired jurisdiction and is exercising the same. It has the power and it is its duty to protect the rights of third persons in the property which is the subject matter of litigation, and to extend to such persons the fullest opportunity to assert their claims to such property.**

This Court in

*Krippendorf vs. Hyde*, 110 U. S., 276;  
28 L. Ed., 145,

realizing the predicament in which third parties might be placed if unable to sue for the recovery of property belonging to them which is the subject matter of litigation between other persons, referring to *Freeman vs. Howe*, 24 How., 450, said:

"For, if we affirm, as that decision does, the exclusive rights of the Circuit Court in such a case to maintain the custody of property, seized and held under its process by its officers and thus to take from owners, wrongfully deprived of possession, the ordinary means of redress by suits for restitution in State Courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the Court itself which maintains control of the property; and, as this may be not be done by original suits, on account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the

Court in auxiliary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant, from whose possession it has been taken, the opportunity to assert and enforce his right. And this jurisdiction is well defined by Mr. Justice Nelson, in the statement quoted, as arising out of the inherent power of every court of justice to control its own process so as to prevent and redress wrong."

The same considerations that moved this Court to lay down and enforce the rule just quoted when applied to the Courts of first instance, have equal weight, we submit, when the cause is in this Court. This Court now has sole jurisdiction; all other Courts are excluded. No Court other than this Court can now afford the petitioner any relief. What was said in *Krippendorf vs. Hyde*, (supra), that "it is but common justice to furnish \* \* \* an equal and adequate remedy in the Court itself which maintains "control of the property", applies to the present situation. We respectfully submit that it is as much the duty of this Court as it was said by this Court to be the duty of the lower Courts "to control its own process so as to prevent and "redress wrongs."

It is no answer to assert that the petitioner should be compelled to wait until this Court has decided the appeal.

That answer could be made to every one who seeks to intervene, claiming property that is in the custody of any Court. Every intervening petitioner could be easily disposed of if the parties to the litigation could shut the doors of the Court in his face telling him that there would then be no obstacle to his bringing suit in an-

other Court, when the Court having jurisdiction over the property, at the termination of the pending litigation released the property, provided he could then get service on the parties or jurisdiction over the property.

This petitioner should not be compelled to wait until this litigation is ended. If he owns the stock he is entitled to its immediate possession and to the use of the dividends.

We call attention to a further consideration: Should the decree appealed from be affirmed, it might be a race between the English corporation and its liquidator, a citizen of Great Britain, and this petitioner as to whether they could get the securities out of the jurisdiction of the American courts before he could get service upon them or impound the securities.

Should the decision of the appeal in this case be favorable to the appellant Sexton, he could not complain of this intervention, for the Bankruptcy Court has ordered him to turn this Cripple Creek stock over to Gorlow's assignors and the other "owners".

When the petitioners's motion was before the District Court, there was some talk of "laches" because neither the petitioner nor his assignors intervened sooner, but it must not be forgotten that the stock claimed by petitioner is only a comparatively small fraction of the securities involved in this suit and there is no claim by any of the parties that they would have abandoned this litigation if they had known of the claim of "the owners"; as a matter of fact, all the parties, all the time, knew of the claim. There is

no pretense that there has been any "change in the condition or relations of the property or the parties" by reason of any delay on the part of the petitioner.

*Gallier vs. Cadwell*, 145 U. S., 358; 36  
L. C. Reps., 738.

**It is respectfully submitted that petitioner's motion should be granted.**

HENRY WOLLMAN,  
KURNAL R. BABBITT,  
Counsel for John Gorlow,  
Petitioner.

# Supreme Court of the United States.

OCTOBER TERM, 1911.

\_\_\_\_\_  
No. 92.  
\_\_\_\_\_

Office Supreme Court, U. S.  
FILED.

DEC 7 1911

JAMES H. McKENNEY,

CLERK.

LAWRENCE E. SEXTON, AS TRUSTEE IN BANKRUPTCY OF  
KESSLER & Co.,

*Appellant,*

*against*

KESSLER & COMPANY, LIMITED, AND ITS LIQUIDATOR,

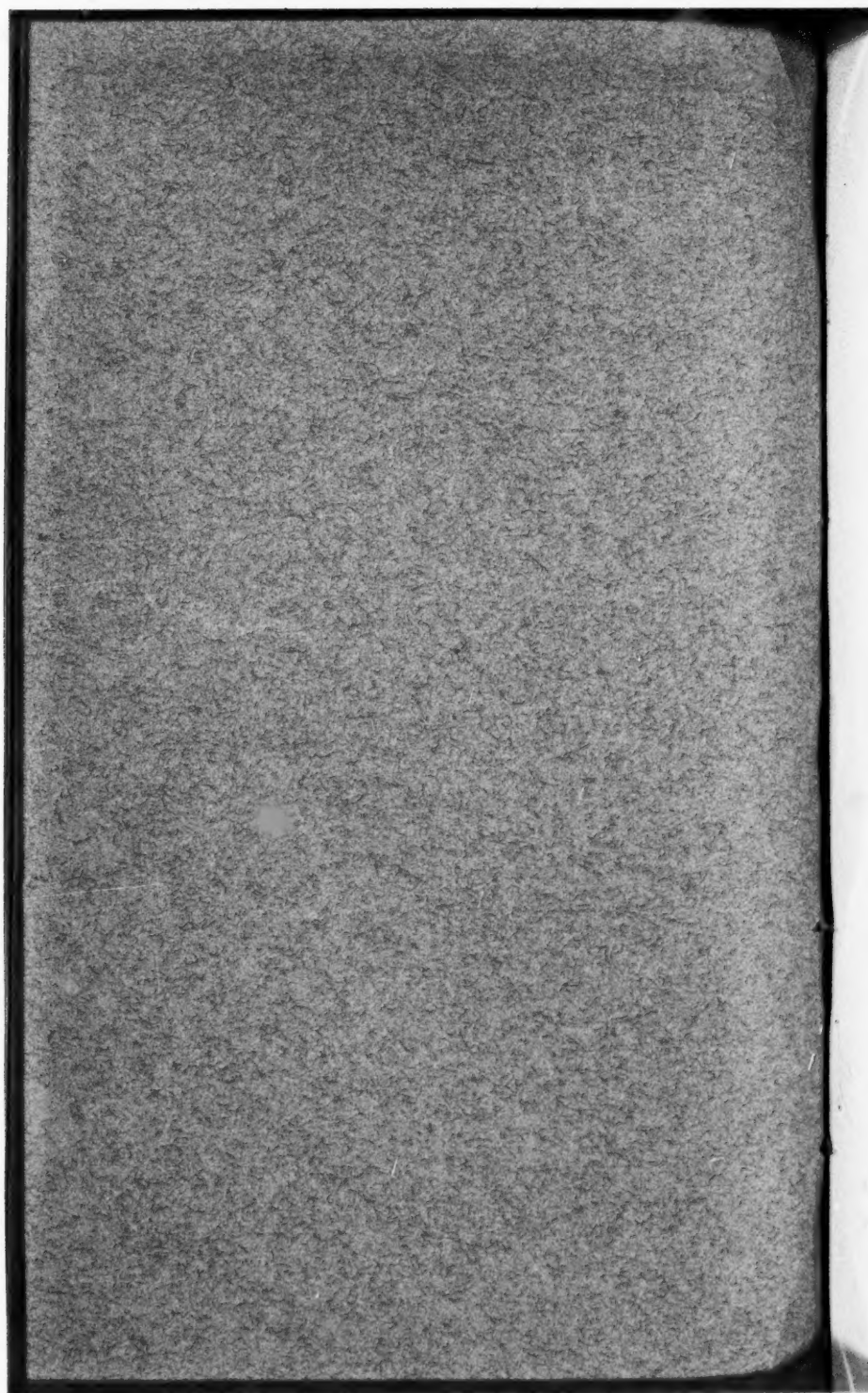
*Appellees.*

## Brief for Appellant.

JOHN LARKIN,

*Attorney for Appellant,*

44 Wall St., New York City.



# Supreme Court of the United States.

LAWRENCE E. SEXTON as Trustee in Bankruptcy of Kessler & Company and ALFRED KESSLER, RUDOLPHE E. FLINSCH and WILLIAM K. GILLET, composing the said firm of Kessler & Company,  
Appellant,

AGAINST

KESSLER & COMPANY, LIMITED,  
and FRANK YOUATT, liquidator,  
Appellees.

October Term,  
1911.

No. 92.

## BRIEF FOR TRUSTEE IN BANKRUPTCY PLAINTIFF-APPELLANT.

This is an appeal by the plaintiff-appellant from a decree of the United States Circuit Court of Appeals for the Second Circuit, entered June 9, 1909, reversing a final decree of the United States District Court for the Southern District of New York, entered December 4, 1908, in favor of the plaintiff-appellant and directing a dismissal of the bill as to the defendants-appellees. This appeal is taken under the Act of March 3, 1891, 26 Stat. at Large, 828, Section 6 as amended.



The matter in dispute exceeds the sum of \$1,000, exclusive of interest and costs (Record, p. 1146, top).

### **Statement of the Case.**

On October 25, 1907, the defendant Kessler & Co., of New York, transferred certain securities (itemized pp. 936 and 937 of Record) valued by them at \$631,859, to Kessler & Company, Limited, of Manchester, England, one of the former's creditors. On the 30th October, 1907, Kessler & Co., of New York, made an assignment for the benefit of creditors and on the 8th day of November, 1907, a petition in bankruptcy was filed against them and a receiver therein was appointed.

The order appointing the Receiver also contained an injunction running against Kessler & Co., of Manchester, and Henry Kessler, the managing director of said company and chairman of the Board of Directors, restraining them from removing said property from the City or State of New York or from the possession of the Hanover Safe Deposit Company where the securities were then lodged (Record, p. 7, bottom).

The securities were thus reached by the process of the Bankruptcy Court. Thereafter the Manchester house of Kessler & Co. took proceedings for voluntary liquidation and the defendant Youatt was appointed liquidator therein on or about November 18, 1907. Subsequently Kessler & Co., Limited, of Manchester, and the liquidator filed in the Bankruptcy Court a petition waiving its right to a plenary suit (Record, p. 9, top) and praying for an order referring the claim of the bankrupt estate to said securities for hearing upon the merits to a special master, and directing the Receiver to proceed with said claim so far as practicable from day to day.

This petition was granted and an order entered as prayed for (Record, pp. 10-11) referring said claim

to Peter B. Olney, Esq., as special master to hear and determine the same upon the merits.

The claim made by the Receiver in Bankruptcy is set forth in his petition (Record, p. 12) and asserts that the transfer of the securities made by Kessler & Co. of New York to Kessler & Co. of Manchester was made when the former was insolvent and within four months prior to filing said petition in bankruptcy and the result of said transfer was to enable Kessler & Co. of Manchester, a creditor, to obtain a greater percentage of its debt than other creditors of the same class; and that Kessler & Co. of Manchester or its agents acting therein in receiving said transfer of securities had reasonable cause to believe that it was intended to give a preference thereby.

The answer of the defendants was a concession of jurisdiction, a waiver of plenary suit and a general denial as to the merits.

On December 30, 1907, Lawrence E. Sexton, the Receiver in Bankruptcy, was duly elected trustee in bankruptcy, and thereafter duly qualified.

Thereafter upon his petition and upon the consent of the attorneys for the defendant an order was made and entered February 7th, 1908, substituting the said Sexton, as Trustee in Bankruptcy, as plaintiff in the action in place and stead of the Receiver in Bankruptcy.

Thereafter and on March 23rd, 1908, an order on consent was entered (Record, pp. 40-42) which directed that the proceeding be considered a plenary suit in equity, designated Mr. Olney as Master in Chancery, and amended all papers accordingly—all without prejudice to the proceedings already had.

The Master in Chancery found the facts and law in favor of the plaintiff's contention. The Master's findings of fact and conclusions of law were confirmed by the District Court; but on appeal to the Circuit Court of Appeals the decree in favor of the plaintiff was reversed upon the law.

*The facts were not disturbed.*

### **Assignment of Errors.**

(Record, p. 1146.)

1st. The Court erred in reversing said decree of the District Court of the United States.

2nd. The said Court erred in awarding costs against the said Lawrence E. Sexton upon reversing said decree.

3rd. The said Court erred in remanding the cause to the District Court of the United States with instructions to dismiss the bill of complaint, with costs

4th. The said Court erred in holding that the transactions between said bankrupts and the defendant Kessler & Company, Limited, as found by the Master in Chancery and the District Court of the United States constituted a declaration of trust by the bankrupts in favor of the defendants Kessler & Company, Limited, in respect to the securities which are the subject of this action or any securities for which said securities were substituted.

5th. The Court erred in holding that any trust of the said securities, or securities for which the said securities were substituted, existed in favor of the defendant Kessler & Company, Limited.

6th. The Court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted a mortgage of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company, Limited.

7th. The Court erred in holding that the facts as found by the Master in Chancery and by the Dis-

trict Court of the United States constituted a pledge of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company, Limited.

8th. The Court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted an equitable lien in the nature of a mortgage upon the said securities in favor of the defendant Kessler & Company, Limited, which equitable lien was valid against the complainant with or without a change of possession.

9th. That the Court erred in holding that when the defendant Kessler & Company, Limited, obtained possession of the said securities on October 25th, 1907, it lawfully held them as pledgee or mortgagee.

10th. That the Court erred in holding that the transfer of possession of the said securities on October 25th, 1907, to the defendant Kessler & Company, Limited, was not a transfer made within four months of bankruptcy within the meaning of the act of Congress known as the Bankruptcy Act.

11th. That the Court erred in holding that the facts herein as found by the Master in Chancery and by the District Court of the United States did not constitute a voidable preference within the meaning of the act of Congress known as Bankruptcy Act.

12th. That the Court erred in holding that the transfer of the said securities from the bankrupts Kessler & Company to the defendants Kessler & Co., Limited, did not take place within four months of the filing of the petition in bankruptcy.

13th. That the Court erred in holding that the taking possession of said securities by the defendant

Kessler & Company, Limited, on October 25th 1907 related back to June 30th 1903 the time of the arrangement between the bankrupts and the said defendant Kessler & Company, Limited, or to any other date.

14th. That the Court erred in holding that the defendant Kessler & Company, Limited, had an equitable right to the said securities and that said right and equity were created years before the bankruptcy and that said defendant could at any time have enforced its said right to the possession of said securities, and that no element of fraud or any intervening rights of purchasers or attaching creditors here appear, and that said securities were not property, the possession of which would be visible to third persons or would afford a basis of credit, and in holding that such possession was taken by the said defendant on October 25th, 1907, in pursuance of a pre-existing right and that no estoppel obtains against the said defendant.

15th. The Court erred in holding that the facts herein as found by the Master in Chancery and the District Court of the United States as a matter of law did not and could not constitute reasonable cause in the defendant Kessler & Company, Limited, to believe that the bankrupts in surrendering possession of said securities on October 25th, 1908, intended to give the defendant Kessler & Company, Limited, a preference, and that said defendant as a matter of law took said possession as a matter of right under a mortgage or pledge.

The errors assigned are intended to bring before this Court for determination the following propositions:

- a. May the privileges of a pledgee be raised against the pledgor's trustee in bankruptcy when the pledgor was allowed to remain in

possession of the property and deal with it as his own with no delivery to—or possession by—the pledgee until within four months of the pledgor's bankruptcy.

- b. If such a transaction fails as a pledge may it be sustained as against such trustee as an equitable mortgage, an equitable pledge or a declaration of trust as against such trustee.
- c. Was not the arrangement fraudulent as a matter of law and void in any aspect of the case as against the trustee?

### **Statement of Facts.**

At all the times that concerns this suit, and for many years prior thereto, the appellee, Kessler & Co., Ltd., a corporation, or its predecessor, the English firm of Kessler & Co., were engaged in the business of accepting drafts, issuing and honoring letters of credit, accepting deposits, &c.; they were also engaged in a general dry goods business. The principal office was at Manchester, England; but there were branch offices at Bradford, England, and also at New York City.

At all such times there was also a New York firm or copartnership called Kessler & Co., whose business was buying and selling exchange, making and obtaining loans, buying and selling securities on and off the New York Stock Exchange, advancing moneys in a commercial way, financing various kinds of enterprises, issuing letters of credit, accepting deposits, and generally carrying on the business of domestic and foreign banking. Of the two concerns, the English one was the more important.

Prior to 1901 William Kessler, of England, the father of the bankrupt Alfred Kessler, was the head of the New York firm and also of the English firm. He died in 1901, and the New York firm then took in the bankrupt Gillett as a member; but

the estate of William Kessler still remained interested in the New York firm, because not only was his original contribution of \$95,000 allowed to remain either as capital or as a loan (p. 56), but the estate also loaned to the bankrupt Alfred Kessler \$78,000 to be used as further capital.

In 1902 the English firm was changed into a corporation, which is the appellee here; and the estate of William Kessler took shares therein for his interest in the English firm (Master's Report, pp. 1003, 1004). The authorized capital stock was £250,000, divided equally between ordinary and preferred shares. Of the £125,000 of ordinary shares the executors of William Kessler owned £80,000, Henry Kessler (uncle of the bankrupt Kessler) about £5,000, P. W. Kessler (brother of the bankrupt Kessler) £10,000, *Alfred Kessler, one of the bankrupts*, £3,000, and, except Mr. Averdieck and Mr. Mazzabach, who owned £10,000 and one share respectively, *none except members of the Kessler family had any interest in the ordinary shares.*

Of the £125,000 preferred shares authorized, only £112,000 were issued; and of the latter Hugo Kessler owned £7,000; Mrs. Manskopf, £2,400; her daughter Marion, £1,200; Helen Linthe, a niece, £2,000; Mrs. Edward Kessler, £10,000; George Kessler's trustees, £,5000; William Kessler's widow, £6,500; George A. Kessler, £3,000; P. W. Kessler, £10,000; *Alfred Kessler, one of the bankrupts*, £3,000; his sister, Mrs. Ashton, £1,500, and another sister, Mrs. Solly, £1,500.

*The Kessler family*, therefore, owned £108,500 out of £118,500 ordinary shares, and £54,300 out of £112,500 preferred shares (Master's Report, pp. 1003-1004).

The directors of the appellee were Henry Kessler, P. W. Kessler, George Kessler and George Averdieck (Master's Report, p. 1003); and all its members resided and still reside in England, except the bankrupt Alfred Kessler.

# BUSINESS DEALINGS BETWEEN THE TWO HOUSES.

These two houses, thus closely connected by common members, by common financial investment, and by the closest family blood relationship, had carried on business for many years, and a large part of it had consisted in the New York house selling here bills of exchange drawn by the latter on the appellee, *which the appellee accepted for a commission* (pp. 480, 481). The drafts were generally "long" drafts, or long term drafts, so called because they matured along time, sixty or ninety days, after acceptance. But so close were the ties between the houses, and so complete the confidence reposed in the New York house that, so far as appears, no security was ever asked of or given by them for final payment of their drafts.

In 1903 certain correspondence passed between the two houses looking to a so-called "security" or "protection" to the English house in its acceptance of these drafts. The correspondence consisted of a letter from the appellee on February 17, 1903 (Record, p. 980); and of a letter from the bankrupts on June 30, 1903 (Record, p. 889) and one from the Manchester house on July 8, 1903 (Record, p. 889). These letters indicated the plan of "security" or "protection" to be followed; and that plan is relied on here by the appellee to avoid the provisions of the Bankruptcy Act. It will be noted that the first letter is marked "*Private*"; it begged to refer to the question of New York's providing "security" for drawings which had already been touched on "privately"; that as it would not be convenient for New York to provide this immediately, "and as we in no wise wish to inconvenience you," June 30th was fixed as the date when "the necessary securities should be set aside for us and a list sent us"; that the writers did "not propose to name a fixed amount of credit," but would rather like to see the present drawings reduced somewhat (Record, p. 980).



Following up this, the New York house wrote on June 30, 1903, stating that as instructed by the bankrupt, Alfred Kessler, they had that day "placed in a separate package in our safety vault the following securities marked 'escrow for account of Kessler & Company, Limited, Manchester,'" which "escrow is intended as a protection against our long drawings against your good selves"; a list is given of Oklahoma shares, United Lighting & Heating shares, Daimler Mfg. Co. shares, and United Breweries bonds, total stated value \$426,081 (Record, p. 889).

Receipt was acknowledged by the appellee on July 8, 1903, which stated that "*if at any time you have the opportunity of realizing these securities or any part of them you are at liberty to take them and replace them by others of equal value, though in that case we should of course like to see rather better quality.*"

The exact words of the three letters referred to, were as follows:

"17 FEB. 3.

Private.

Messrs. KESSLER & Co.,  
New York.

DEAR SIRs:

We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30th of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for and we remain, dear Sirs,

Y'rs very truly,  
P. W. KESSLER."

" JUNE 30, 1903.

Per S. S. 'OCEANIC.'  
Messrs. KESSLER & Co., Limited,  
Manchester.

DEAR SIRs:

In accordance with instructions from Mr. Alfred Kessler we have today placed in a separate package in our safe deposit vaults the following securities, package marked, 'Escrow for account of Kessler & Co., Limited, Manchester:'

1484 shares Oklahoma Gas & Electric Co., at 25.....	\$37,100.
2428 shares United Lighting & Heating Co., at 12.....	29,136.
2352 shares Daimler Manufacturing Company, at 50.....	117,600.
\$373,000. United Breweries Co. first 6s, at 65 .....	242,245.

\$426,081.

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige,

Yours very truly,

KESSLER & Co."

" 8th July 3.

Messrs. KESSLER & Co.  
New York.

DEAR SIRs,

We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing these securities or any part of them,

you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality. \* \* \*

We are, dear Sirs,  
Your very truly,  
P. W. KESSLER."

This authority to sell was repeated in the letter of January 20, 1904 (p. 892).

#### CONTINUED BUSINESS BETWEEN THE HOUSES.

The plan thus outlined was followed by the two houses. Between 1903 and 1907 New York continued to sell drafts on Manchester, *which Manchester accepted for a commission* (pp. 480, 481).

The securities which the bankrupts held as "protection" for the appellee were kept in this wise: the bankrupts had a special safe or vault, where property and securities belonging to third persons were kept; the securities in question were not kept there. They also had a general safe or vault, where such of their securities were kept as were in general use; that safe or vault consisted of three compartments, in the lowest of which was kept the leather trunk holding the securities that were carried back and forth to the office every day. The upper two compartments were formed by shelves, on which were placed other securities. The securities in question were on one of these shelves, and were kept either in an envelope marked as indicated in the letter of February 17th, 1903, or, if the envelope would not hold them all, in a rubber band binding them to such an envelope. The bankrupts kept a "loan book," in which was recorded in *black* ink the loans *by* them and the securities held therefor, and in *red* ink the loans *to* them and the securities given by them therefor; among the red ink entries were the list of securities then present in the "escrow."

Of the securities in the escrow, the bankrupts collected the coupons and interest when due; from

time to time they removed batches of the securities, and sold them or hypothecated them, and placed the proceeds in their own bank account; but never remitted such proceeds to the appellant or in any wise accounted to the appellant for them (p. 1038). Of such removals Manchester was notified afterwards by a private letter, and Manchester invariably replied, by private letter, that the act was "in order." Frequently, when the bankrupts removed and disposed of such securities they substituted therefor such other securities as their discretion or convenience dictated, and in that case changes in the loan book were made accordingly; they notified Manchester of such changes, and Manchester never objected to a change, or claimed or exercised any right to supervise or veto the substitutions; at times they were mildly quizzical as to the quality of the substitutions, but nothing more.

*But frequently the bankrupts (although keeping the proceeds of a sale or hypothecation of these escrow securities, and not accounting to Manchester therefor) never made any substitution therefor at all; and this was invariably the case when they could spell out any increase in the escrow's market value, so as to produce a supposed surplus over the outstanding drafts. And in every such case Manchester advised that the bankrupts' act was "in order." The record contains a list of notifications and approvals of these withdrawals (Record, pp. 879-885, 889-937).*

#### BUSINESS AND CONDITIONS IN 1907.

The business dealings between the houses continued as before down to 1907. In that year the difficulties of the New York house, which has begun some time before, increased. The bulk of their securities were not listed on the New York Stock Exchange; a large part of them had been taken over as a result of unsuccessful underwritings, and the bankrupts had held on to them for one, two or three years in order to sell them without a loss, con-

tinually hoping the market would change for the better (Master's Report, p. 1030). In 1907 the securities were unsalable and useless as collateral, so that the firm's maturing obligations could not be taken care of in that way; and even first-class Stock Exchange securities had declined substantially since the beginning of the year; many of their foreign correspondents had withdrawn or shortened the bankrupt's drawing credits, the German Bank of London had cut off entirely their £10,000 drawing credit (p. 506); Schunck & Co. did the same for a like amount and refused to renew it (pp. 508, 697); the Anglo-Foreign Banking Company refused to renew advances on Cripple Creek securities pledged (p. 696), and the London banks exhibited great unwillingness to extend credit to American houses, and a further contraction was expected (p. 704). There were other difficulties: failures had taken place in the financial world (p. 752), and the bankrupt's business had been bad (p. 750); the balance sheet showed a loss of \$35,000 for April (pp. 752, 753); it was getting harder to sell exchange, the bankrupts had become borrowers and their loans were falling due, one for \$100,000 was called, a creditor had sued them and after trial the jury had rendered a verdict against them for \$140,000 (p. 1030); their long term drafts on various bankers in London, Paris and various cities on the Continent had to be met, and the situation was grave, not to say desperate. Thereupon on June 15, 1907, the bankrupt Flinsch sailed for Europe to see if he couldn't get some help over there. He arrived in London on June 25th, and his correspondence thereafter with the New York house and between P. W. Kessler and the bankrupts give a picture of the financial straits of this house for the six months prior to the bankruptcy petition. His letters refer to his efforts in London, all of which failed; then to those in Frankfort and Dresden, all unsuccessful (pp. 701, 702); then he almost got help in Switzerland, but the banks there

required security, and he was afraid to give it for fear all the other banks might also demand it; he tried to get help from his own family, succeeded in collecting some amounts due from some of them, but was afraid to dun them too hard for fear they and their financial circle would conclude his firm was in difficulties.

During his absence abroad Flinsch was in constant correspondence not only with Alfred Kessler of his own firm, but with P. W. Kessler of the appellee (pp. 710, 712, 714, 134); and finally a meeting was arranged between Flinsch and P. W. Kessler at Baden Baden on September 17th. *After a subsequent meeting at Frankfort (p. 844) Kessler immediately left for England, and a couple of days after P. W. Kessler's arrival, Henry Kessler, of the appellee, started for New York post haste.*

In the meantime letters of the fullest confidence had passed between New York and Manchester; as soon as prepared the bankrupt's balance sheets were forwarded to the appellee; criticisms by Manchester of the bankrupts' methods were respectfully listened to, and apologies or explanations made; business generally was reported, especially regarding Cripple Creek stock and U. S. Reduction & Refining stock (both of which were at various times in the escrow) the loss of the Daimler plant by fire (Daimler stock also in the escrow), the collection of insurance thereon (pp. 744, 746, 753); the worrying times; the fall in Stock Exchange prices, often twenty-five points an hour; the unsalability of exchange, their method of borrowing; the Sidenberg verdict against them for \$140,000; the nervous condition of the Exchange, and the failure of a prominent banking house; the bankrupt's bad business during the past year; their net loss of \$35,000 in April (pp. 749, 750, 753, 754); that a partner, the bankrupt Gillett, is drawing too much out of the firm; that the cause of the heavy drafts on Manchester is because the Dresden Bank had stopped their long drawings; that the Basler Handelsbank had required A1 collat-

eral; that the German Bank had refused to continue its £10,000 credit, and that Ruffer had knocked £10,000 off theirs; that Flinsch had been after his family for money (pp. 756, 761, 762, 764); failure to sell exchange against Cripple Creek stock, and "we were forced to sell £20,000 Manchester and put up escrow as per separate letter" (p. 767); expresses regret for Manchester's worry, and that he, the bankrupt Kessler, *had had to take doses to obtain sleep*, and the worries of 1893 and 1903 were nothing to those of last month; that Dreyfus had refused to renew credits; that Daimler will be a loss; of a disaster on the P. W. & S. Ry. (one of the escrow stocks) that will spoil the showing of earnings; that Milne, Trumbull & Co. (one of the concerns they were financing, whose paper was in the escrow) was not good and had run behind \$7,000; that some of the companies whose stocks and bonds were in the escrow "are our *betes noir*, and the truth is that our condition is not as good as it was at the end of last year" (p. 767), &c., &c.

This letter was answered by P. W. Kessler, and has been offered in evidence by the defendant (p. 843).

*It is the only letter of Manchester which we have been able to obtain relating to the correspondence passing between the parties on the subject of the financial condition of the New York house.*

This letter was written after the meeting with Flinsch in Frankfort, and from it it appears that he had written Flinsch a long letter, and that a copy of that letter was enclosed.

*Neither letter nor copy has been produced.*

The attention of the Court is particularly called to this letter, of which the following is an extract (Record, p. 843):

"I safely received your letter of the 6th.  
 "It was much what I expected and not altogether pleasant reading. I sent it on to  
 "Eddy for his comments. I am very sorry  
 "for you, but with that enormous line of

"drawings on us, I am afraid I cannot leave  
 "all the worry to you.

"If these drafts should want caring for,  
 "we should find ourselves in a *very bad hole*  
 "and I must say I am not easy."

#### FAILURE OF NEW YORK HOUSE AND SEIZURE BY AP- PELLEE OF THE SECURITIES.

Henry Kessler, the chairman of the appellee's Board of Directors, and the uncle of the bankrupt Alfred Kessler, left Manchester on September 26 and arrived in New York on October 4, 1903. He made the bankrupt's office his headquarters and received mail there for the first part of his stay; afterwards his mail came to Kissel, Kinnicutt & Company, bankers, in Wall Street. On 7 October, 1907, the Manchester house sent the following cable to him (Master's Report, p. 1043):

"Flinsch here 12 A. M. their position not at  
 "all satisfactory please consult A. K. would  
 "advise selling stock are trying here arrange  
 "loan against Orleans Cripple success doubt-  
 "ful.  
 "Do not approve of more Manchester.  
 "What is best that can be done."

A further cable came from Manchester about October 18, 1907, to Henri Kessler (pp 781 and 784, Record; Master's Report, 1043).

On October 20th, the directors of the Knickerbocker Trust Company met and asked assistance of the Clearing House, which was refused; on October 22nd that trust company failed, and immediately a run started on the Trust Company of America, almost opposite the bankrupt's house, and the lines of withdrawing depositors stretched for blocks, remaining night and day in their places, and mounted police had to keep order. During the week of October 21st, the bankrupts made frantic efforts to borrow money, but without success. On October 24th there was no money to be had on the Stock Exchange until 2 P. M., when



\$25,000,000 was placed on the floor to loan at 50 (fifty) per cent., and the closing of the Exchange was contemplated. On that day Henry Kessler consulted with Mr. McLaughlin, the appellee's attorney, with reference to the appellee's position and the escrow securities, told Mr. McLaughlin that the securities were not in the possession of the Manchester house, but were set aside and "pledged to us"; Mr. McLaughlin stated that he did not consider that safe, and advised Henry Kessler, as a director of appellee, to get the securities into his possession (p. 396). Henry Kessler saw Kissel ("Gus") on October 24th and conferred with him. On October 25th there was little, if any, money on the Stock Exchange, and what there was was quoted at 115 per cent (p. 97). On that day he went to the bankrupts' office, saw Bertie Kessler, a kinsman and confidential clerk of the bankrupts, told Bertie Kessler that he was going to take the securities, and together they went to the vault, got the escrow securities and put them in another vault in the same safe deposit company which Henry Kessler engaged in the name of appellee (p. 399). At that time the Elkton stocks, although listed as being in escrow, were actually out west in the possession of the bankrupts' agents (United Lighting and Heating Stock, although listed too, were elsewhere, but they are not the subject of this litigation). On the same day Henry Kessler sent this cable to the appellee:

"Have secured escrow, financial affairs  
 "critical, cannot sell demand. Is it possible  
 "arrange with Lloyd's Bank limited cash  
 "loan against Cripple" (p. 431)

and wrote to P. W. Kessler the following letter:

"KESSLER & Co.,  
 Bankers.  
 54 WALL STREET,

NEW YORK, 25 October, 1907.

DEAR WILLY:

I wrote you on the 22d inst. and received  
 your 2 letters of 15th & 16th inst., *we have*

*had two very miserable & exciting days here, you will have seen all from the papers how Morgan & others helped the stock Exchange with funds. Alfred just comes with the news that they will issue Clearing-house certificates, this they hope will relieve the money market. The great difficulty is to sell Exchange even cheques and this has bothered McLean very much, however he succeeded in getting what he wanted for to-day; but the position is very awkward and we must hope that next week the Exchange market will be better as otherwise K. & Co. like many others would be in a hole. I saw Cass yesterday I asked him to buy some of our bills, but he said he did not know what to do with them.*

*At the suggestion of Alfred I cabled you to-day if you could not arrange from Lloyds a cash advance against Cripple Creek; however I doubt it. Alfred sold a few stocks, but it is very difficult to get rid of anything & things outside the Stock Exchange are unsalable & that is the reason why stocks have gone down so much. The Central Trust Co. called to-day for their loan of \$100,000; but Alfred could arrange with Wallace to let it lie over until next week. He is naturally very much worried, but I am trying to calm him down. He cabled Flinsch to-day he wanted \$200,000 by Monday & asked him what he could do to find funds. You have no idea how things are here, the Trust Co. of America was besieged the last two days by depositors wanting their money. Police on horseback & foot kept order in Wall Street. Of course we cannot say where all this will lead to, but things seem a trifle better to-night, Saturday & Sunday may help to calm the excitement.*

*It is strange I anticipated all your ideas about our Escrow as you will see from my memo of yesterday. Your & Eddy's letters strengthened my hands & we acted on it at once. I went with Bertie to the North American Safe Deposit Co. Exchange Place secured a small safe in the name of K. & Co. Lt. Manchester, England, and gave power to Bertie, McLean & Nestle, Bacon would*

not have done. To open this safe, the combination No. of the Lock is 197 & Box No. 2097. We went carefully through all the documents to see that they are all endorsed & in order, the Brooklyn Mortgage has a transfer in blank by Gillett & his wife, the other notes are all endorsed in blank. I think we *are safe now*, anyhow we are in possession of the documents. Alfred has made out a new list at *reduced* prices, amounting to about \$513,000—against the £80000.—credit. The other £20,000.—are in the separate escrow also in our safe. *To get anybody to take care of our bills here* in case of need would be very difficult, probably impossible. *Brooks would have to help us thro' against the securities we could give him. If K. & Co. can pull thro' which I hope*, we must get out of this acceptance business or reduce it considerably. Alfred telephoned for Gillett to come down he promised to come in the afternoon, but did not. It is most harassing & annoying that the man is no good & cannot be tackled. I hope Flinsch will be here soon

Alfred would like you to see if you cannot get a quotation in London about the Underground Electric London in our escrow. Saw Hesslein & Ernst yesterday, the latter is coming over next week; I was astonished what a large place theirs is, about 100 clerks & 2 large warehouses.

Called again on Abbs & asked him to push where he could for remittances. \* \* \* The rest of the day I spent at Wall Street & must say I have by now had more than enough of it. I hope I can get off by the "Baltic" next week, but will first see how things are going here before I decide. \* \* \* Bertie & Nestle dined with me yesterday & they went to take me a Motor ride tomorrow. Sunday I am going out to Guss at Morristown.

Weather keeps very fine & cool. I hope this will be my last letter & au revoir, love from Alfred

Your affect. cousin,

HENRY.

I added to my cable "Yes" in answer to Zimmermas inquiry about the Collmann din-

ner, but I would rather be out of it, however I suppose I had to accept."

The cable to Flinsch, referred to in this letter, reads as follows:

"Financial affairs critical, cannot sell demand, Central Trust has made a call loan  
 "one hundred thousand dollars, we require  
 "one million marks October 28th, can you  
 "obtain?" (p. 433).

On October 29th, Henry Kessler was at the bankrupts' office until four or five o'clock in the afternoon and had an interview with Mr. Kissel, and Alfred Kessler and Mr. Kissel also had a long private interview. On that day the subject of a general assignment by the bankrupts was considered, and the draft of such a document was in fact already prepared (p. 93).

During the week ending October 26th and that commencing October 28th, the bankrupts, in addition to their ordinary business obligations and their current obligations as depositaries of funds subject to check, had to furnish "cover" for drafts on London to upwards of a million dollars (p. 657). Alfred Kessler sought assistance from J. P. Morgan (p. 466). *On October 30th the general assignment was made which recited the inability of the firm to pay its debts in full* (pp. 562-567). Thereupon Henry Kessler cabled the appellee:

"Assigned, Kisskin (meaning Kissel, Kin-  
 "nicutt & Company) advise ask Lloyd's  
 "Bank Limited Manchester advance against  
 "collaterals escrow, cannot obtain advance  
 "here now, stop order shipment Bentley's  
 "goods, eight hundred pounds with Gressley  
 "all paid."

And Bertie Kessler cabled Manchester, "Assigned, Manchester may be safe. Bertie." After the assignment the bankrupts obtained by mail the Elkton shares from their agents out west and turned

them over to Henry Kessler (p. 314), and also just before the main escrow was delivered to Henry Kessler, Daimler common was taken out of the escrow and Daimler preferred substituted, the latter being deemed more valuable.

On November 7th, 1907, the creditors filed an involuntary petition against the bankrupts, and they were on that day adjudged bankrupts.

#### FINDINGS OF THE COURTS BELOW.

The Master found, on an overwhelming preponderance of evidence, that the bankrupts were insolvent on October 25, 1907, and that on that day, which was within the four months period, they made a transfer to the appellee, the effect of which transfer was to enable the appellee to obtain a greater percentage of its debt than other creditors of the same class; and that the appellee then had reasonable cause to believe that a preference was thereby intended (pp. 1039, 1040, 1046).

The District Court confirmed the Master in toto (pp. 1089-1104).

The Circuit Court of Appeals, without disturbing or criticising the facts found, reversed on the law, *and dismissed the bill.*

#### POINT I.

**There was no valid legal pledge to the defendants because possession was not given until October 25, 1907.**

Kessler & Company, of Manchester, had an office in New York; nevertheless they allowed the secur-

ities to remain with the bankrupts; and the bankrupts, although they had a special vault for securities belonging to third persons, did not keep these securities there but in their own vault (Record, p. 126, p. 838). The securities kept by the bankrupts in their vault had been examined on two different occasions, once by P. W. Kessler and once by Mr. Youatt, now the liquidator.

During the time that the securities remained with the bankrupts changes were made therein all the time (pp. 215-317). After the changes were made Kessler & Company, of Manchester, were notified thereof by mail and not by cable (Master's Rep., p. 1009).

Letters from the bankrupts were kept in a *private* letter book and letters from Manchester were filed in a *private* letter file (pp. 140-265). The correspondence relating to the escrow was known only to three people in the office (pp. 840-841). The vault in the Safe Deposit Company, in which the securities were kept was four feet high, two feet wide, with two shelves, making three compartments. In the lower compartment there was stored the leather trunk which was carried back and forth each day from the office (p. 127). *The other shelves were not divided into secret compartments, and no part of the interior of the vault was under lock and key.* The securities referred to, as well as the envelope, which was fastened to the securities by means of a rubber band, were contained in one of the two upper sections of the vault. These envelopes by reason of the changes in the securities from time to time became worn out and other envelopes were substituted in their place. These envelopes bore the words upon them: "Escrow, Kessler & Co., Manchester" (Record, pp. 308-309). The changes in the securities were also recorded in a book kept in the office called a loan book (p. 335). All of the securities referred to were in the vault of the bankrupts in New

York, except the United Lighting & Heating shares, which were in Manchester, and the Elton shares which were in the possession of the bankrupts' brokers at Colorado Springs (p. 314) and were not delivered to the Manchester house until after the general assignment was made.

From the foregoing it clearly appears that the securities were in the actual physical possession of the bankrupts. They had never been delivered into the possession of the Manchester house or to any one on their behalf until the 25th of October, 1907. It further appears that every act of ownership possible was performed by Kessler & Company. They sold the securities when they could sell them and hypothecated them as the demands of the business required, without consultation with Manchester (Master's Rep., p. 1038). Collections of coupons and interest accruing from the collateral in the escrow were collected by the bankrupts and deposited in their own bank account, and the principal of notes, when paid by the maker, also went into their bank account; that was so whether it was notes, or bonds, or stocks, or dividends, or coupons, or money paid on account of principal (Master's Rep., 1038).

Under such circumstances the authorities are clear that no valid legal pledge existed (*Casey v. Caberoc*, 96 U. S., 467; *Wilson v. Little*, 2 N. Y., 443; *Buffalo German Insurance Co. v. Third National Bank*, 162 N. Y., 170; *Security Warehousing Co. v. Hand*, 206 U. S., 415).

Possession is of the essence of a pledge; and without it no privilege can exist as against third persons.

*Casey v. Cavaroc*, 96 U. S., 467.

*Casey v. Nall. Park Bank*, 96 U. S., 492.

*Casey v. Schuchardt*, 96 U. S., 494.

The doctrine of

*Casey v. Cavaroc, supra,*

was reaffirmed in

*Security Warehousing Co. v. Hand,*  
206 U. S., 421.

The Court said:

"The general law of pledge requires possession and it cannot exist without it," and in head note, held "that where there is no delivery or change of possession receipts issued by a Warehouse Company are not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned therein."

This distinguishes

*Union Trust Co. v. Wilson, 198 U. S.,*  
530.

This has also been the law of this State since 1849,

*Wilson v. Little, 2 N. Y., 443,*

and has been reaffirmed in

*Buffalo Bank v. Third Nat'l Bank, 162*  
*N. Y., 170.*

There the Court of Appeals said by

GRAY, J.:

"If we assume the existence of a contract between the defendant bank and Levi (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by delivery. Possession is of



“ the essence of a pledge, in order to raise a  
“ privilege against third persons.”

Citing

*Casey v. Cavaroc, supra.*

*Wilson v. Little, supra.*

Upon the authorities, therefore, there is no difference between the law of the United States as established by *Carey v. Cavaroc* and the law of the State of New York (*Davenport vs. City Bk., 9 Paige, 12*).

*Wilson vs. Little, 2 N. Y., 446:*

“ Possession must uniformly accompany a  
“ pledge. The right of the pledgee cannot  
“ otherwise be consummated. And on this  
“ ground it has been doubted whether incor-  
“ poreal things like debts, moneys in stocks,  
“ etc., which cannot be manually delivered,  
“ were the proper subjects of a pledge. It is  
“ now held that they are so; and there seems  
“ to be no reason why any legal or equitable  
“ interest whatever in personal property may  
“ not be pledged; provided the interest can be  
“ put by actual delivery or by written trans-  
“ fer into the hands or within the power of  
“ the pledgee, so as to be made available to  
“ him for the satisfaction of the debt.

“ Goods at sea may be passed in pledge by  
“ a transfer of the muniments of title, as by  
“ a written assignment of the bill of lading.  
“ This is equivalent to actual possession, be-  
“ cause it is a delivery of the means of ob-  
“ taining possession.”

*Christia v. Atlantic & N. P. R. R.,*  
*133 U. S., 233.*

“ A pledge in the legal sense requires to be  
“ delivered to the pledgee. He must have  
“ possession of it. \* \* \* In the case of  
“ stocks and other choses in action the  
“ pledgee must have possession of the cer-  
“ tificate or other documentary title with a  
“ transfer executed to himself, or in blank

"unless payable to bearer, so as to give him  
 "the control and power of disposal of it.  
 "Such things are then called pledges, but  
 "more generally collaterals; and they may  
 "be used in the same manner as pledges  
 "properly so called. If there is no transfer  
 "attached to or accompanying the document  
 "it is imperfect as a pledge, and requires a  
 "resort to a court of equity to give it effect.  
 "These propositions are so elementary that  
 "they hardly need a citation of authorities  
 "to support them."

That the securities involved were bonds payable to bearer, notes and shares endorsed so as to pass title by delivery does not differentiate this case from the general rule. The delivery into the physical possession of this defendant was still necessary.

Some of the securities required endorsement, others did not, being payable to bearer; those requiring endorsement were endorsed, not for the defendants, but so that they might be used by the New York house as occasion required in case of sale, or in case the same were hypothecated. This is the usual method of conducting the banking business; that all their securities should be negotiable in form so as to make good delivery in case of sale, or good collateral in case of pledge to other banks.

This being the situation, Kessler & Co. transferred these securities from their *right* hand to their *left* hand, endorsed on an envelope "Escrow for Kessler & Co., Limited," and fastened it with a rubber band to the securities, continued to hold them as before, and maintained every right of ownership over them which they theretofore had.

The Manchester house wished to have security without taking possession of the property, and Kessler & Co. wished to secure them without giving possession of the collateral.

Meanwhile the general creditors were dealing

with Kessler & Co., believing that the latter owned the property, and gave them credit accordingly.

Under the authorities, therefore, the defendant has failed to establish a common law pledge of the securities by the plan set forth in the correspondence commencing June 30, 1903.

## POINT II.

**The legal pledge having failed it cannot be supported either as an equitable pledge, an equitable mortgage or a declaration of trust.**

The act provides, § 60a, that a "transfer" of any property of the bankrupt shall be void under specified conditions; a "transfer" is defined, § 1 (25) to include "the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

§ 67a provides that "Claims which for want of record or for other reasons would not have been valid *liens* as against the claims of the creditors of the bankrupt, shall not be *liens* against his estate."

We do not suppose it will be contended that the transfer of possession on October 25th did not constitute "a transfer" within the meaning of the Bankruptcy Act; such a contention would be impossible in view of the express application of the definition to changes in the possession, or parting with the possession, or every other mode of disposing of the possession, of property. Undoubtedly the

appellee's claim is that, eliminating entirely what took place on October 25th, nevertheless a lien existed by virtue of the correspondence in 1903 and the acts pursuant to that correspondence. We say that whatever rights between the parties that correspondence may have created, they were not such rights as are saved from the operation of the Bankruptcy Law.

#### ANSWERING EQUITABLE PLEDGE THEORY.

The necessary basis for any equitable lien is an express agreement to subject certain property thereto. As possession is a *sine qua non* for a legal pledge, so an *express agreement to deliver possession* is a *sine qua non* for an equitable lien in the nature of pledge.

In this case we say there was no express agreement to deliver possession at any time; which is manifest from the letters themselves. Nor is there any implied agreement to deliver; certainly none to deliver on demand, because the clear intent was that possession should remain in the New York house—since possession was absolutely essential to the bankrupts' continued dealing in and with the securities. Moreover, the correspondence in no wise specified the amount of drawings, and there was no legal obligation on Manchester to accept at all, nor on the New York house to draw; and if the bankrupts furnished "cover" for their drafts, manifestly all the appellee's interest in the securities immediately ceased. Certainly until the bankrupts failed to furnish "cover"—*in other words, failed to meet their obligations, and thereby as bankers became insolvent*, Manchester could not, even by implication, spell out a right to possession. This was the conclusion of the Master and also of the District Court (pp. 1049, 1091).

The following case and others therein cited are authorities for the foregoing proposition:

*In re Great Western Manufacturing Co.*, 18 Am. B. R., 259.

“ But the theory and purpose of the Bankruptcy Act were to distribute the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors of the same class. To this end every judgment procured or suffered against him, every transfer by an insolvent of any of his property, every conceivable way of depleting it after the commencement of the four months the effect of which is ‘to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class,’ is declared to be a voidable preference if the creditor has reason to believe that a preference is intended thereby. Act July 1, 1898, c. 541, and Act Feb. 5, 1903, c. 487 (30 Stat., 562, 32 Stat., 799) (U. S. Comp. St., 1901, p. 3445; U. S. Comp. St. Supp., 1905, p. 689); *Swartz v. Fourth National Bank*, 8 Am. B. R., 673; 54 C. C. A., 387, 389, 117 Fed., 1, 3. An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors *pro rata*. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or

“ transfer should be adjudged voidable if it  
 “ is otherwise so, and that the mortgagee or  
 “ transferee should be remitted to his original  
 “ agreement. In this way the property at  
 “ the commencement of the four months and  
 “ its value may be preserved for the general  
 “ creditors, and the mortgagee or transferee  
 “ may retain every lawful advantage his  
 “ earlier contract confers upon him. Any  
 “ other course of decision opens a new and  
 “ enticing way to secure preferences, nulli-  
 “ fies every provision of the law to prevent  
 “ them, and invites fraud and perjury. Hold  
 “ that transfers within four months in per-  
 “ formance of agreements to make them be-  
 “ fore that time do not constitute voidable  
 “ preferences, and honest debtors would  
 “ agree with their favored creditors before  
 “ the four months that they would subse-  
 “ quently secure them by mortgages or trans-  
 “ fers of their property, and just before the  
 “ petitions in bankruptcy were filed they  
 “ would perform their agreements. Dis-  
 “ honest men who made no such contracts  
 “ might falsely testify that they had done  
 “ so and thus by fraud and perjury sustain  
 “ preferential transfers and mortgages made  
 “ within the four months to relatives or  
 “ friends. The great body of the creditor,  
 “ would be left without share in the prop-  
 “ erty of their debtor and without remedies  
 “ and a law conceived and enacted to secure  
 “ a fair and equal distribution of the prop-  
 “ erty of debtors among their creditors would  
 “ fail to accomplish one of its chief objects.  
 “ This Court will hesitate long before it ap-  
 “ proves a rule so fatal to the most salutary  
 “ provisions of the bankruptcy law, and our  
 “ conclusion is:

“ A mortgage or transfer of his property  
 “ by an insolvent debtor within four months  
 “ of the filing of a petition in bankruptcy  
 “ against him, which otherwise constitutes  
 “ a voidable preference, is not deprived of  
 “ that character or made valid by the fact  
 “ that it was executed in performance of a

"contract to do so made more than four  
 "months before the filing of the petition.  
 "Wilson v. Nelson, 183 U. S., 191, 198, 7  
 "Am. B. R., 142, 22 Sup. Ct., 74, 46 L. Ed.,  
 "147; *In re Sheridan* (D. C.), 3 Am. B. R.,  
 "554, 98 Fed., 406; *In re Dismal Swamp*  
 "Co. (D. C.), 14 Am. B. R., 175, 135 Fed.,  
 "415, 417, 418; *In re Ronk* (D. C.), 7 Am. B.  
 "R., 31, 111 Fed., 154; *Pollock v. Jones*, 10  
 "Am. B. R., 616, 124 Fed., 163, 61 C. C. A.,  
 "555; *Anniston Iron & Supply Co. v. Annis-*  
 "ton Rolling Mill Co. (D. C.), 11 Am. B.  
 "R., 200, 125 Fed., 974; *Johnston v. Huff*,  
 "Andrews & Moyler Co., 13 Am. B. R., 287,  
 "133 Fed., 704, 66 C. C. A., 534; *In re Man-*  
 "del (D. C.), 10 Am. B. R., 240, 127 Fed.,  
 "863. In *Wilson v. Nelson*, 183 U. S., 191,  
 "198, 7 Am. B. R., 142, 22 Sup. Ct., 74, 46  
 "L. Ed., 147, the debtor had given an irre-  
 "vocable power of attorney to the creditor  
 "to confess judgment many years before.  
 "Judgment was confessed under it within  
 "the four months, and the Supreme Court  
 "held it to be a voidable preference. *In re*  
 "*Sheridan* (D. C.), 3 Am. B. R., 554, 98 Fed.,  
 "406; *In re Ronk* (D. C.), 7 Am. B. R., 31,  
 "111 Fed., 154, and *In re Dismal Swamp Co.*  
 "(D. C.), 14 Am. B. R., 175, 135 Fed., 415,  
 "417, 418, mortgages executed within the  
 "four months in performance of agreements  
 "to give them made more than four months  
 "before the filing of the petitions in bank-  
 "ruptcy were held to be voidable preferences,  
 "and this view seems to be sustained by the  
 "terms of the Bankruptcy Act, by the more  
 "cogent reasons, and by the weight of au-  
 "thority."

*Page v. Rogers*, 211 U. S., 575, was a case where  
 this Court found it unnecessary to make the square  
 decision, but indicated pretty clearly, we think, its  
 attitude on the question. This Court there said (p.  
 578):

"It is, therefore, argued that as the con-  
 "veyance, on June 1, 1903, was in perform-

“ance of this agreement, which antedated  
 “the bankruptcy proceedings by more than  
 “four months, it cannot be regarded as a  
 “preference. The facts, however, do not  
 “raise the question which was argued. Upon  
 “a proper interpretation of the evidence we  
 “need not determine whether an insolvent  
 “debtor may make an agreement to convey  
 “a substantial portion of his assets to a  
 “favored creditor, keep that agreement se-  
 “cret for more than four months, and then  
 “execute it in fraud of the rights of his other  
 “creditors, in favor of a creditor who then  
 “has reasonable cause to believe that he is  
 “receiving a preference.”

*Wilson v. Nelson*, 183 U. S., 191, was a case in Wisconsin where Johnstone in February, 1885, loaned \$9,000 to Nelson and as security took Nelson's note payable in five years and an irrevocable power of attorney to confess judgment after maturity of the note. Nelson was a trader. Interest was paid up to November, 1898, for a long time prior to which date Nelson had been, as he well knew, insolvent. On November 21, 1898, Johnstone caused judgments to be duly entered upon the power of attorney, upon which an execution levy was made, and on December 15th, the property was sold for \$4,400, which sum was applied in part payment of the judgment. All this was done without Nelson's knowledge or consent. On December 10th an involuntary adjudication in bankruptcy was made against Nelson, the act of bankruptcy alleged being the permission to Johnstone to obtain a preference by such judgment. This Court held that the preference must be set aside.

*Security Warehousing Co. v. Hand*, 206 U. S., 415, affirmed the judgment of the Circuit Court of Appeals, Seventh Circuit. The Circuit Court of Appeals there said:

“The appellants \* \* \* assert that if  
 “they have neither negotiable receipts \* \* \*  
 “nor a pledge \* \* \* nevertheless they  
 “have equitable liens which entitle them to



" the possession of the property as against  
 " the trustees. \* \* \* Section 67a vitiates  
 " as liens all claims which for want of record  
 " or for other reasons the bankrupt's creditors  
 " might have avoided as liens: that is, no  
 " secret liens or equities shall prevail against  
 " the trustees that were not good against the  
 " general unsecured creditors represented by  
 " the trustee. \* \* \* The liens thus saved  
 " are liens, not promises to give liens, not  
 " equitable claims, that what ought to have  
 " been done shall be considered done, but  
 " liens perfected according to law."

While this particular feature of the case was not alluded to by this Court, except in passing, it was not disturbed—as is noted by Archbold, J., in

*Fourth Street Bank vs. Millbourne*, 172  
*Fed. Rep.*, 177 (C. C.A., 3rd Circuit).  
*Re Sheridan*, 98 *Fed.*, 406.  
*Copeland v. Barnes*, 147 *Mass.*, 388.

This last case defined a similar provision in the insolvent laws of Massachusetts.

The case was this. A buyer of goods gave as security to lender of purchase money, a bill of sale running to purchaser, which the lender believed to be a mortgage.

Learning afterwards that it was not a mortgage he obtained one and later on took possession of the property.

These later transactions were within six months of the insolvency proceedings. \* \* \* The Court said:

" If no delivery of the goods is made, it can  
 " be no more than an agreement for a pledge  
 " or mortgage. Such agreement made at the  
 " time when a debt is contracted will not  
 " avail to protect the actual pledge or transfer  
 " of the property, when made from the  
 " operation of the statute against preferences  
 " by an insolvent debtor.  
 " The statute makes no exception in favor  
 " of securities given in pursuance of a previ-  
 " ous agreement, but declares all transfers

“and conveyances void if made within six  
 “months and under the circumstances  
 “stated.”

In

*Bank of Leavenworth v. Hunt*, 78 U.  
 S., 394,

it was held that an agreement between parties insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promise its president to deliver to the bank whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the meantime retained in their possession, is void as against their other creditors.

Such an agreement does not create any lien upon the property or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the Bankrupt Act.

Citing

*Griswold v. Sheldon*, 4 Comstock, 581.  
*Wood v. Lowry*, 17 Wendell, 492.

There is another basic principle of equity jurisprudence upon which the theory of equitable lien must rest. That is, there must be specific and definite property to be charged with the lien.

This element is entirely lacking in this case.

The arrangement made between the parties contemplated the sale and other use of the securities as originally deposited in June, 1903.

The letter of the Manchester house gives this right to the New York house in express terms.

The right was not only accorded, but both parties so acted, for thereafter the New York house, from time to time, took from these securities and put others in their place. This was done without previous consultation with Manchester, as to what se-

curities should be taken out and what securities should replace those so removed.

After the change had been made the New York house would notify the Manchester house, and at no time did the latter make any protest or criticism of such acts.

The changes thus made were so numerous that of the four different classes of securities constituting the "escrow" in June, 1903, there were twenty items delivered to Henry Kessler, October 25, 1907, one only remaining unchanged (Master's Report, p. 1051, fol. 3132).

This being the fact what specific securities were charged with a lien in June, 1903?

Of course, under the plans arranged between the houses there was no agreement for a lien on any specific property, nor could there be; the promise was vague and indefinite as to the property to be charged with a lien.

The arrangement really was that the New York house should keep not certain specified securities on hand, but undetermined property of sufficient value to enable Kessler & Co. of Manchester to repay themselves for acceptances in case of necessity.

This falls far short of the exact description of property to be charged with the lien.

On this subject Judge Hough said (p. 1091):

"As for bundling up the stocks and bonds,  
 "putting them in an envelope, leaving the  
 "envelope in the New York Kessler's safe  
 "deposit box and changing the items at will,  
 "—this process, as a method of giving  
 "'security,' is about equivalent to one man  
 "advising another that the latter may con-  
 "sider as his security whatever may at  
 "any time be in the first speaker's right  
 "hand trousers' pocket \* \* \* The intent  
 "of the parties seems to me quite plainly  
 "this, viz : that Kessler of New York should  
 "keep on hand—not certain specified secur-  
 "ities, but property of sufficient value to  
 "enable Kessler of Manchester to repay him-  
 "self for acceptance of long drawings, in

“ case he either preferred to do so or found  
 “ it necessary \* \* \* and the final irresist-  
 “ ible inference is that the ‘security’ was to  
 “ pass into the control of the creditor \* \* \*  
 “ only when it was deemed advisable to take  
 “ it in order to prevent other creditors from  
 “ getting some or all of the same.”

Passing this point of definiteness for the purposes of argument, will a court of equity uphold on the theory of equitable lien, an attempted pledge which fails at law, when the rights of creditors are involved?

Whether this question must be answered by the decisions of this Court or the Court of Appeals of New York is immaterial, as they are in harmony.

*Casey v. Cavaroc*, 96 U. S., 467.

*Security Warehousing Co. v. Hand-*  
*206 U. S., 415.*

*Wilson v. Little*, 2 N. Y., 446.

*Buffalo G. I. Co. v. Third Natl. Bank*,  
*162 N. Y., 163.*

*Casey v. Cavaroc* held possession to be of the essence of a pledge; and without it no privilege can exist as against a third person; that this is the common law as well as the civil law, *Code Napoleon* and the *Civil Code of Louisiana*; that the thing pledged may be in the temporary possession of the pledgor as special bailee without defeating the legal possession of the pledgee; but where it has never been out of the pledgor's actual possession and has always been subject to his disposal by way of collection, sale, substitution or exchange, no pledge or privilege exists as against third persons; that although the pledgee may by action against the pledgor or his heirs under the law of Louisiana recover possession of the thing, he cannot sustain a privilege thereon as against creditors or against a bank receiver or an assignee in bankruptcy who represents them; that equity will not regard a thing as done which has not been

done when it would injure third parties who have sustained detriment and acquired rights by what has been done.

The Court, having carefully examined the law relating to pledges, beginning with the New York decisions, and pointing out that possession was the one essential to a valid pledge, says, page 486:

“It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of a pledge. A pledge and possession which is its essential ingredient must be made out, or their privilege fails. *An agreement for a pledge raises no privilege.* There is no mortgage; for the title of the securities was never transferred to them.”

Upon the point as to whether the assignee in bankruptcy may set up want of privilege, the Court had this to say:

“Whilst it is generally true that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor or assignor held it, it is not universally true. Many transactions would be binding on the latter which would not be binding on the assignee. All sales and securities made for the actual purpose of defrauding creditors are of this class.  
\* \* \*

“Without the privilege of right or preference the Credit Mobilier has no claim to hold the securities in question as against the other creditors. How, then, can it set up such claim against a receiver? The receiver does not represent the bank alone. *He represents all parties. He represents the law which takes charge of the property for the benefit of all creditors according to their respective and mutual rights.* Suppose no receiver had been appointed and when the bank failed it had called the creditors together and laid all its assets on a table, could the Credit Mobilier, in presence of the other creditors, have placed its hands

“on the securities in question and claimed them by right of any privilege or preference. It certainly could not have done so if it had no privilege as against them. \* \* \* The existence of a receiver or trustee for all did not change it. That one essential thing which the law requires for the subsistence of the privilege, namely, possession, was wanting. Other formality might have been dispensed with. But possession is essential—made so by the express terms of the law \* \* \*.”

“The requirement of possession is an inexorable rule of law adopted to prevent fraud and deception; for if the debtor remain in possession the law presumes that those who deal with him do so on the face of his being the unqualified owner of the goods.”

In *Security Warehousing Co. v. Hand*, 206 U. S., 415, the same point was made by counsel as is now made by the defendants.

The actual possession of the property was not in the bailee. The constructive possession was; but the Court looked behind all the legal machinery to the basic fact of possession, and held that as there was no change of possession there was no pledge.

Thereupon the pledgees or those in privity with them set up the *equitable lien theory*, claiming that it was superior to the title of the trustee and citing many cases which may be found on the defendant's brief.

The Court wiped out the theory of equitable lien in a word:

“Under the circumstances of this case we are satisfied there was no valid pledge and no equitable lien in favor of the intervenors which would take precedence of the title of the trustee by virtue of the special provisions of the bankrupt act.”

The following cases are also in point:

*Ryttenberg v. Schefer*, 11 Am. Bk., 664, which distinguishes between the common law lien and equitable lien, holding that common law lien by

way of pledge required possession actual or constructive; and that equitable lien could not be maintained because there was no specific agreement therefor.

Holt, J.:

"All the cases which have been called to my attention, in which the facts are somewhat similar to those in the case and in which an equitable lien has been upheld, are cases in which either there was a *specific agreement* for a mortgage or lien of some kind, or the goods although remaining about the premises of the party giving the lien were set apart in a lot or room leased to the party to whom the lien was to be given and were delivered into the custody and control of an agent of the person to whom the lien was to be given."

"The simple fact in the case is that Radon & Co. *wanted to obtain advances without delivering possession of the property*, and Schefer, Schramm and Vogel *wanted to acquire a lien without taking possession of the property*."

"It was one of the numerous attempts to give a lien, by owners of property while retaining the apparent ownership of it."

"The law denies any validity to such arrangement whenever bankruptcy occurs and the rights of general creditors are involved."

"As is well stated in the leading case of *Casey vs. Cavaroc*, 96 U. S., 467. \* \* \*

"The requirement of possession *is an inextinguishable rule of law* adopted to prevent fraud and deception, for if the debtor remains in possession, *the law presumes* that those who deal with him do so on the faith of his being the unqualified owner of the goods."

*Re Sheridan*, 98 Fed., 406:

"An agreement to pledge personal property as security for a debt is not executed when the goods are not delivered to the creditor, nor set apart and treated as his property, and where the creditor takes possession of

“ the property a few days before the filing of  
 “ a petition in bankruptcy against the debtor,  
 “ the transaction is voidable as a preference  
 “ notwithstanding that the original agree-  
 “ ment was made more than four months  
 “ before that time.”

Another case very much like the present is

*Nisbit v. Macon Bank*, 12 Fed. Rep.,  
 686.

Purdee, J.:

“ Equity will not regard a thing as done  
 “ which has *not* been done, where it would  
 “ injure third parties who have sustained  
 “ detriment and acquired rights by what has  
 “ been done.”

In order to tide over the Macon Bank and Trust Company which had become involved, Cubbedge, Haslehurst & Co. and said bank arranged to conduct the business of the bank and agreed to give security therefor by deposit of stock script of the firm in the bank. Two of the members of the firm were president and cashier respectfully of the bank. The Court said:

“ Under this arrangement, various certifi-  
 “ cates of stock of the bank belonging to the  
 “ firm were replaced by Lockett, partner in  
 “ the firm and Cashier in the bank, from time  
 “ to time in a separate box under his own  
 “ control in the vault of the firm; but it does  
 “ not appear that any transfer or authority  
 “ to transfer was ever given, nor that the cer-  
 “ tificates were retained by the bank as a cer-  
 “ tain deposit, but it does appear that the  
 “ firm retained and exercised the right of  
 “ withdrawal and substitution at their own  
 “ convenience and without consulting the  
 “ bank.”

It was held that the transfer of the securities having taken place within four months, was void under Section 5128, Rev. St., and that the person



receiving had reasonable cause to believe that the pledgor was insolvent. \* \* \* The Court, continuing, said:

“For years the verbal agreement to keep the bank secured with its own scrip was allowed to run with no note, no transfer, nothing but Lockett’s tin box, which he emptied and replenished as the exigencies of the case required, when, five days before the crash, the most formal of notes and formal of pledges were put in writing, duly witnessed, and the stock transferred on the books besides.

“The parties had slept too long on this agreement for a continuous hypothecation to have been awakened without occasion of some kind.”

In

*Fourth St. Natl. Bank v. Melbourne Mills Co.*, 172 Fed., 177,

the Circuit Court of Appeals for the Third Circuit said by Archibald, J.:

“It is however contended that there being an intent to pledge, an equitable lien was at least created, which entitles the certificate holders to the fund. It is difficult to see how a transaction, which, for want of delivery is ineffective as a pledge, can be pieced out, so as to make it hold as something else.

“There would be little left to the established doctrine with regard to pledges, if that was the case; and it is somewhat singular that, in all the litigation, where pledges of personal property has been upset, for want of a delivery, no one should have discovered this easy way out. This is not to say that an equitable lien, under some circumstances, may not exist; but only that there is nothing to support it here. It never arises or is enforced except against property in the hands of a party to the original transaction out of which it is claimed to grow, or his voluntary representatives, or one who has notice

“ of it and is affected with it as a superior  
 “ right; within which all the cases cited in  
 “ support of it will be found to fail (19 Am.  
 “ & Eng. Enc. (2nd Ed.) 36). It is not good  
 “ as against a trustee in bankruptcy, taking  
 “ title, in the interest of creditors, by opera-  
 “ tion of law, as is the case here.”

*Zartman v. Bank, 189 N. Y , 267,*

in which the Court of Appeals said, p. 271:

“ If a lien was created by the mortgage  
 “ upon property not in existence at its date,  
 “ possession after it came into existence was  
 “ of no importance. If no lien was created  
 “ by the mortgage upon such property, the  
 “ taking of possession pursuant to its terms  
 “ did not create one as against general cred-  
 “ itors, *who are presumed to have dealt with*  
 “ *the mortgagor in reliance upon its absolute*  
 “ *ownership of the stock on hand.* While  
 “ the record of the mortgage was notice to  
 “ all, it was notice of all its terms, which in-  
 “ cluded the right of disposition for the use  
 “ and benefit of the mortgagor, with no duty  
 “ to apply the avails upon the mortgage in-  
 “ debtedness. If the question had arisen be-  
 “ tween the parties to the mortgage, equity  
 “ might recognize a contract to give a lien  
 “ and treat it as an actual lien, but it arises  
 “ between the mortgagee and the general, un-  
 “ secured creditors, who had little, if any-  
 “ thing, to rely upon except the shifting stock,  
 “ which, directly or indirectly, they them-  
 “ selves had furnished. The credit extended  
 “ by them enabled the mortgagor to carry on  
 “ business, and if the product of that credit  
 “ goes to the mortgagee, not only are they  
 “ helpless, but, if the law is so declared, here-  
 “ after manufacturing corporations needing  
 “ credit will be helpless also.” \* \* \* “ As-  
 “ suming that a court of equity may uphold  
 “ and give effect to such a mortgage when  
 “ the rights of the mortgagor and mortgagee  
 “ only are involved, it will not aid the mort-  
 “ gagee at the expense of subsequent creditors  
 “ when their rights are involved. It will not  
 “ treat a contract to give a mortgage upon a

" subject to come into existence in the future  
 " as a mortgage actually then given, if the  
 " result would deprive the general creditors  
 " with superior equities so far as after-ac-  
 " quired property is concerned, of their only  
 " chance to collect debts. It is only when the  
 " rights of third parties will not be preju-  
 " diced that equity, treating as done that  
 " which was agreed to be done, will turn a  
 " contract to give a mortgage on property to  
 " be acquired into an equitable mortgage on  
 " such property as fast as it is acquired and  
 " enforce the same accordingly against the  
 " mortgagor, his representatives and assigns.  
 " In other words, the agreement and inten-  
 " tion of the parties to a mortgage upon prop-  
 " erty not yet in existence will be given  
 " effect by a court of equity so far as prac-  
 " ticable, provided no interest is affected ex-  
 " cept that of the mortgagor and mortgagee,  
 " who entered into the stipulation, but equity  
 " closes its doors and refuses relief if the  
 " interests of creditors are involved. The re-  
 " sult thus announced is founded on prin-  
 " ciple and sanctioned by authority. | Kribbs  
 " v. Alford, 120 N. Y., 519, 524; Wisner v.  
 " Ocumpaugh, 71 N. Y., 113; McCaffrey v.  
 " Woodin, 65 N. Y., 459; Jones on Chattel  
 " Mortgages (4th ed.), 170; Beall v. White, 94  
 " U. S., 382, 386.] " \* \* \*

" As we have seen, equity takes hold of the  
 " subject with a strong hand in order to  
 " enable the mortgagee to get what the mort-  
 " gagor intended to give, provided no other  
 " interest is involved, but when the creditors  
 " of the mortgagor enter the field equity goes  
 " no farther than the law and will simply  
 " enforce a lien if it exists without attempt-  
 " ing to perfect it if something is lacking to  
 " make it complete. *The taking of possession*  
 " *by the mortgage is relied upon by the ap-*  
 " *pellant to 'ripen the lien,' which, as is con-*  
 " *ceded, was inchoate before. If the contract*  
 " *between the mortgagor and mortgagee fell*  
 " *short of creating a lien, as was clearly the*  
 " *case, the act of taking possession did not*  
 " *enlarge, perfect or complete it. A mortga-*  
 " *gee cannot add to his title by his own act.*"  
 " \* \* \* "When the general creditors

“intervened through the plaintiff, the mort-  
 “gagee was simply in possession with title  
 “to the property that was in existence when  
 “the mortgage was given, but with no title  
 “to the shifting stock subsequently acquired.  
 “As to that property, it had only the prom-  
 “ise of the mortgagor, which equity could  
 “help out by treating as done what was  
 “agreed to be done, but which it will not  
 “help out to the injury of unsecured cred-  
 “itors. The rights of the defendant, incom-  
 “plete when it took possession, are incom-  
 “plete still, for they can be perfected only by  
 “the aid of equity, and equity refuses to  
 “help under the circumstances of this case.”

The reason for what the courts have defined as  
 the “inexorable rule of law” that possession of the  
 pledge must be in the pledgee will be found clearly  
 set forth in the latest work on this subject

#### Van Zile's Bailments and Carriers.

Section 237a. “The delivering of the property  
 pledged by the pledgor to the pledgee *and the ac-  
 ceptance and continued possession of the property  
 by the pledgee, is that which gives to the world  
 notice of the pledgee's interest and the extent of the  
 rights to the property in possession.* These stand  
 in the place and stead of the recording of a mort-  
 gage or the filing of a lien, as it is well understood  
 principle of law that possession of property is notice  
 to all the world of all the rights and interests of the  
 possessor in the property possessed.”

“It has been noticed that in the pledge or pawn  
 there is no recording of the same in a public record  
 kept in some public office: there is no filing of notice  
 of the lien which the pledgee has upon the property.  
 In the place of this, and as effectual as all this would  
 be, is the fact that the property had been delivered  
 into the possession of the pledgee and is held by him  
 as security for the indebtedness.”

“Other creditors of the pledgor may not actually  
 know the extent of the claim or the conditions of

the pledge, but the law holds them, because of this delivery and possession to a full knowledge of all that pertains to the holding of the pledged property by the pledgee."

"*Bona fides* will not avail pledgee in absence of delivery and possession."

"Section 238. *As between the parties to a pledge a contract to pledge would be binding* even if the property had not been delivered and such a contract resting upon a valuable consideration could be enforced; for the reason, among other things, that 'equity considers substance rather than form.' But before the doctrine of equitable pledge can be applied there must be a contract showing that the debtor designed to subject the particular property to the payment of the debt."

"*But as against subsequent purchasers in good faith or the creditor of the pledgor, as we have already seen, delivery is an essential; and as to such persons, the pledgee could not enforce the contract of pledge; there would be no notice of the existence and the pledgee would not be held to be a bona fide holder of the property.*"

Another case which supports the contention of the plaintiff is

*Skelton v. Coddington, 185 N. Y., 88.*

The case related to the validity of a chattel mortgage, to support which the doctrine of equitable lien was advanced.

*Inter alia* the Court, by Judge Cullen, said, page 90:

"An agreement between the parties by  
 "which the mortgagor was to carry on a re-  
 "tail store, making purchases from time to  
 "time and selling off in the ordinary manner,  
 "the mortgagee all the time retaining a lien  
 "on the whole stock by way of mortgage  
 "under which he could, upon default, take  
 "possession of the remaining goods and sell  
 "them for the payment of his debt, was held

" void as against creditors (*Edgell vs. Hart*,  
 " 9 N. Y., 213). This last case may be some-  
 " what limited by the subsequent decision in  
 " *Brackett vs. Harvey* (91 N. Y., 214), but  
 " nevertheless it is unquestionably the law that  
 " where there is an agreement that the mort-  
 " gator may sell for his own benefit the mort-  
 " gage is fraudulent as a matter of law  
 " (*Southard vs. Benner, supra; Polts vs. Hart*,  
 " 99 N. Y., 168; *Haugen vs. Hachemeister*, 114  
 " *Id.*, 566; *Mandeville vs. Avery*, 124 *Id.*, 376).  
 " The instrument under which the plaintiff  
 " claims his lien expressly provided that the  
 " mortgagor might sell and dispose of the  
 " property and apply the proceeds to the pay-  
 " ment of the debt, 'excepting such portion  
 " thereof as is necessary for the expenses of  
 " the business or as he or they may need to  
 " replenish or increase the said stock of goods.'  
 " The plaintiff contends that under the au-  
 " thority of the Brackett case the agreement  
 " that the plaintiff should apply the pro-  
 " ceeds of the sales of the mortgaged  
 " chattels to the purchase of other goods did  
 " not render the mortgage void. I do not  
 " think the decision goes to that extent. The  
 " agreement in that case was a peculiar one.  
 " While it did provide for the application of  
 " the proceeds of sales to new purchases, it  
 " also provided that new mortgages should be  
 " given from time to time on the chattels sub-  
 " sequently purchased. Such new mortgages  
 " were in fact given, and it was the validity  
 " of these later mortgages that was impeached  
 " in the suit then before the Court. As was  
 " pointed out in the opinion, when these  
 " mortgages were given the mortgagee was a  
 " creditor of the mortgagor, whatever may  
 " have been the misapplication of the proceeds  
 " of sales under the earlier mortgages, and  
 " the parties had the right to contract on the  
 " then existing status, because there was no  
 " creditor in a position to question the validity  
 " of the contract. In the course of the discus-  
 " sion it was said that it was perhaps a just  
 " inference from the contract between the  
 " parties that the mortgagor might sell and  
 " apply the proceeds towards new purchases  
 " on condition that the substituted property

"should be brought in and subjected to the  
 "mortgage; that this did not injuriously  
 "affect the rights of creditors, as the substituted property would represent the property  
 "sold and that, therefore, it was not necessary to hold the agreement fraudulent. This  
 "statement was not necessary to the disposition of the cause, and I am frank to say that  
 "I should be loth to accede to it in its entirety. The substituted property might or  
 "might not equal in value the property realized from the lien of the mortgage by sale.  
 "Even in the most favorable view it would  
 "give the mortgagor unlimited power of speculation in the disposition of the mortgaged property. The property might be  
 "wasted by ill-judged speculation, even though the mortgagor acted in good faith.  
 "However this may be, the agreement now before us goes a step further than that  
 "in the Brackett case. It does not require all the proceeds of the mortgaged  
 "chattels to be applied either on the mortgage debt or to the acquisition of new  
 "property, but only the surplus after deducting the expenses of carrying on the business.  
 "We need not consider whether the expenses of the business which the mortgagor was  
 "authorized to deduct from the sales would include compensation for his own services  
 "or not. Plainly they would comprehend rent, clerk hire and similar items. Of such a provision contained in the agreement it is idle  
 "to argue that if the mortgagor acted honestly and lived up to his agreement the property  
 "newly acquired would be the equivalent of that disposed of by sale. On the contrary,  
 "it is not only possible, but, if the business proved unsuccessful, probable that a large  
 "part of the mortgaged property would be sold without the proceeds being applied  
 "either to the reduction of the debt or to new property substituted for that disposed  
 "of."

The reasoning of Judge Cullen in the Skelton case and the conclusions reached by him were affirmed by this Court in

*Frank v. Vollkommer*, 205 U. S., 529.

To summarize; our contention as to this equitable pledge theory is this:

There is no such thing as an equitable pledge; one either has made a pledge or he hasn't. Support for the existence of such a contradiction as "equitable pledge" must be found, if at all, in the fact that equity in some circumstances will consider as done what was agreed to be done. But that doctrine has no application for these reasons:

(a) If X borrows money from Y, agreeing to pledge stock therefor *in futuro*, but doesn't pledge it as promised, Y cannot have specific performance because his legal remedy is adequate in every conceivable case except where X becomes bankrupt; and that is just the one case where equity would not give it because there is no justice in singling out *one of many purely contract creditors*, and giving him everything.

(b) The bankrupts never agreed to give, nor did Manchester stipulate to receive, possession (except after financial embarrassment had intervened)—and hence there was no contract, relative to possession, for equity to enforce by deeming it performed.

#### ANSWERING THE THEORY OF AN EQUITABLE MORTGAGE.

This is the theory adopted by the majority of the Circuit Court of Appeals.

1. The parties did not intend to create a mortgage, but only a pledge with peculiar features, viz., possession to remain in the pledgor with absolute power of disposal.

In New York, as elsewhere, a mortgage of personal property is a transfer of title subject to be divested on condition subsequent, viz., by payment of the debt. The parties intended no such thing:

The intention of the parties is shown by their correspondence; this commenced in February, 1903, and



the first three letters are set forth in full above (pp. 10-11). The succeeding letters were as follows:

In the letter of the 23d December, 1903, from Manchester to New York, specifying the form of certificate which they desire Kessler & Co. to adopt is the following: "We certify that we have specially set aside and *hold* for your account on this the 31st day of December/03 *as security* for the drawing credit which you accord us, the following securities" (R., p. 890).

The letter from New York to Manchester dated 1 Jan., 1904, follows this form, and says: "that we have specially set aside and *hold* for your account \* \* \* *as security* for the drawing credit which you accord us, the following" (R., p. 891).

Again, the letter of 20th January, 1904, from Manchester to New York says: "We are in receipt of your favor of 1st January in which you give us particulars of the *securities you hold in escrow for us against your drawing credit with us*" (R., p. 892).

In Kessler & Co.'s letter to Manchester of 16th February, 1904, referring to a letter by Flinsch of the 12th February, 1904, "wherein we named *fur-ther securities placed in your escrow for a further drawing of*" \* \* \* (R., p. 893).

The Manchester house in acknowledging receipt of the last letter notes "that you have set aside *as escrow to protect the extra drawings* that we have authorized you to make upon us" (R., p. 894).

In Kessler & Co.'s letter of 8th March, 1904, to Manchester, appears the following: "This *collateral* is to go against our drawing of £5,000 of March 1st" (R., p. 895).

On 17th January, 1905, Kessler & Co., Limited, wrote Kessler & Co. stating: "We are in receipt of your private lines of the 4th inst. giving a list of the securities set aside *as cover for your drawings on us*" (R., p. 909).

On September 6, 1904, Manchester wrote noting

"the alteration made in the *securities deposited* against our acceptances" (R., p. 89<sup>9</sup>).

On September 4th, 1904, Manchester wrote to New York as follows: "We have received \* \* \* a "list \* \* \* of the securities now set aside "against your drawing credit on us."

A similar letter was written by Kessler & Co., Limited, to New York on 9th January, 1907.

After the delivery of the securities on October 25, 1907, a formal declaration was made by Henri Kessler in an instrument prepared by the defendant's attorney giving right of access to Nestle and Bertie Kessler to his safe deposit vault in which the language appears as follows: "as collateral to said indebtedness" (pp. 1016-1018). Henri Kessler admits reading both papers before he signed them and that he read the recitals and that the recital stated the facts. The paper dated the 25th was signed at the office of Kessler & Co., and the paper dated October 30th was signed in the same place. It was signed after the securities had been taken from Kessler & Co.'s vaults.

The letter from Manchester, dated December 23, prescribes the form of certificate to be given by Kessler & Co. from time to time; the certificate is to read as follows: "We certify that we have "specially set aside *and hold for your account, &c.*, " \* \* \* " as security.

The letters subsequently written on the first of the subsequent years followed this form:

Letter Jan. 1, 1904,

Letter Jan. 4, 1905,

Letter Jan. 5, 1906,

Letter Jan. 9, 1907.

This intention, as shown by such correspondence, is not muddled by conflicting statements of witnesses as to conversations had when the original arrangement was made. The intention of the parties, that the transaction was to be in the nature of a pledge as distinguished from a mortgage, is sup-

ported by the construction which the parties themselves put upon their agreement, as shown by their acts under the agreement. The salient facts in this connection are that Kessler & Company of New York dealt with the collaterals as their own. They sold them when they could, and they used them as security for their loans when that course seemed necessary, and this was done without consultation with the Manchester house prior to the fact (Master's Report, p. 1009). After the fact it was reported to them as having been done. The proceeds of the sales of the securities were in no way accounted for to the Manchester house by the New York house, but became and were a part of the working capital of the New York house and went into their own account (Master's Rep., p. 1038). The letters themselves, as well as the two formal instruments executed by the Manchester house, after the securities were taken from the possession of the New York house (which instruments are set forth *in extenso* at pp. 1016, 1020 of the Record), indicate that these securities were held as collateral for the indebtedness then existing between the two houses. In the interview between Henry Kessler and Mr. McLaughlin on the 24th of October, the day before these securities were delivered into the possession of the Manchester house, Henry Kessler testified that he said to Mr. McLaughlin that these securities were "pledged" to the Manchester house. At no time has the Manchester house claimed title either as mortgagee or as the general owner of the securities in question. On the 16th July, 1907, Manchester wrote in reply to New York's letter of 8th July, 1907: "We do not know that real estate is just the thing for an escrow of this sort, but we hope you may soon get your price for it and eliminate it from *your assets*." Before a mortgage, either legal or equitable, can exist there must be words sufficiently apt to indicate that the mortgagor intends to part with the title to the mortgagee. There is no intention disclosed to accomplish this fact. On

the contrary, the evidence in the case, as briefly pointed out, positively negatives such a point of view of the transaction.

2. Even if the parties had intended to make a mortgage it would have been invalid

*a.* in so far as it purported to cover after-acquired property; and

*b. in toto* because of provisions in it, and in the method of carrying it out, that made it fraudulent in law and absolutely void as to creditors.

In the *Zartman* case the Court of Appeals said, at page 271:

"If a lien was created by the mortgage  
 "upon property not in existence at its date,  
 "possession after it came into existence, was  
 "of no importance. If no lien was created  
 "by the mortgage upon such property, the  
 "taking of possession pursuant to its terms  
 "did not create one as against general cred-  
 "itors, who are presumed to have dealt with  
 "the mortgagor in reliance upon its absolute  
 "ownership of the stock on hand. While  
 "the record of the mortgage was notice to  
 "all, it was notice of all its terms, which  
 "included the right of disposition for the  
 "use and benefit of the mortgagor, with no  
 "duty to apply the avails upon the mortgage  
 "indebtedness." \* \* \*

"As we have seen, equity takes hold of  
 "the subject with a strong hand in order to  
 "enable the mortgagee to get what the  
 "mortgagor intended to give, provided no  
 "other interest is involved, but when the  
 "creditors of the mortgagor enter the field,  
 "equity goes no further than the law, and  
 "and will simply enforce a lien if it exists  
 "without attempting to perfect it if some-  
 "thing is lacking to make it complete. The  
 "taking of possession by the mortgagee is  
 "relied upon by the appellant to 'ripen the  
 "lien,' which, as is conceded, was inchoate  
 "before. If the contract between the mort-  
 "gagor and the mortgagee fell short of cre-

“ating a lien, as was clearly the case, the act  
 “of taking possession did not enlarge, per-  
 “fect or complete it. A mortgagee cannot  
 “add to his title by his own act.”

It has been pointed out by Judge Ward in delivering his opinion in the Circuit Court of Appeals that if the transaction were a mortgage it would have been good as against the Trustee in Bankruptcy, because under the law of the State of New York, mortgages of choses in action need not be filed. He cited in support of that statement, the Lien Law of New York, Section 90, *Humphreys v. Tatman*, 198 U. S., 91.

*Humphreys v. Tatman*, cited by Judge Ward, was a case decided by this Court, being thereunto “driven” by the case of *Thompson v. Fairbanks*, 196 U. S., 516. Both of the cases last cited arose in Massachusetts and the laws of Massachusetts are essentially at variance with those of the State of New York upon this subject. In fact, the Court of Appeals of the State of New York has so stated in respect to the case of *Thompson v. Fairbanks*, in its opinion given in the *Zartman case*, 189 N. Y., p. 273, using the following language:

“In reading the authorities it is important to  
 “observe how, where and between whom the  
 “questions arose, for the remarks of the  
 “learned judges in discussing the rights of  
 “the mortgagor and the mortgagee are not in  
 “point when the question relates to the  
 “rights of third persons as against either or  
 “both of the parties to the mortgage. Nor  
 “are they in point when, as in *Thompson v.*  
 “*Fairbanks* (196 U. S., 516, 522), the Federal  
 “courts feel bound to follow the decisions of  
 “the State courts as to local questions and the  
 “law of the State where the case arose differs  
 “from that of the State of New York (*Dooley*  
 “*v. Pease*, 180 U. S., 126).”

It would seem that Judge Ward in rendering his opinion had overlooked the controlling effect of

the *Zartman* case and of the *Skilton* case which are the final words of the highest court in the State of New York, because in his opinion he makes no reference to them in any way. It appears from the opinion of Judge Ward (p. 1136, top), that he does not consider that the transaction constituted a mortgage either legal or equitable. He puts the ground for the reversal of the judgment (p. 1136, bottom) as being a declaration of trust. This point will be taken up next in order, and we will now follow the line of reasoning given by Judge Noyes, whose opinion will be found at page 1138 of the Record.

Judge Noyes below, on page 1140 of the Record, states as follows:

“It has unusually been said in the cases of  
 “endorsed shares of stock and negotiable  
 “paper, that whether a transaction should  
 “be regarded as a mortgage, or a pledge,  
 “must be determined from the agreement  
 “between the parties. Accepting this latter  
 “view as correct, there is much to support  
 “the contention that the parties in this case  
 “intended something more than a pledge.  
 “They used the word ‘escrow’ which has  
 “usually to do with the passing of title.”

We admit that the word “escrow” has usually to do with the passing of title, but it has to do with the passing of title only upon delivery, and prior to the delivery of the escrow the rights of the parties as to title remain exactly as before the escrow was created.

The learned Judge proceeds as follows (p. 1140):

“But I think it unnecessary to determine  
 “whether the transaction was a mortgage or  
 “a pledge. It is sufficient to say, in view of  
 “the decision of the Supreme Court, as well  
 “as in view of the facts shown in addition to  
 “the endorsements indicating a mortgage,  
 “that the Manchester house, *after taking*  
 “possession, may safely be regarded as hold-  
 “ing *both* by way of mortgage and by way of  
 “pledge.”

The Court will notice the words "after taking possession." In other words, the learned Judge relies upon possession to ripen the inchoate lien, which is in exact opposition to the rule of law as laid down by the Court of Appeals in *Skilton v. Coddington* and *Zartman v. The Bank*; because in the latter case it was exactly this which was argued with great force before the Court of Appeals, to wit: that an agreement for a lien is illegal and nugatory because of lack of possession, yet it was inchoate and could be rendered valid and effective, in other words, could ripen into a valid lien by subsequent possession. To this statement the Court of Appeals most emphatically said no. It cannot be a lien; not having ever existed, it could not ripen. On page 1141 of the Record, Judge Noyes proceeds with his opinion as follows:

"Moreover were the fact of taking possession absent in this case it would probably be possible to sustain the claim of the Manchester house to the securities upon broader and more satisfactory lines than could be drawn from the distinction just referred to. The legal difference—before delivery of endorsed and unendorsed securities—except in the case of special endorsement—would seem to be slight. But the equities of the case, coupled with what the parties did—aside from any technicality—make out a strong case in support of an equitable lien in the nature of a mortgage upon the security in favor of the Manchester house valid against the trustee in bankruptcy without a change of possession."

Such is not the law of New York. The Chattel Mortgage Act of New York (Lien Law, Sec. 90), provides that all mortgages of "goods and chattels" shall be absolutely void unless there is an actual and continued change of possession, or the mortgage is filed. Assuming (without conceding) that this act does not apply to mortgages of stocks, bonds and promissory notes, and that filing of such a mortgage

would be ineffectual to dispense with a change of possession, the result is simply that a mortgage of stock, bonds, &c. is to be considered as if the act had never been passed. But such a mortgage would have been void prior to the act, unless possession had changed. The act merely substituted filing for a change of possession in certain specified cases, of which ours is now assumed not to be one; but in no way affected or validated other mortgages. The error in the appellee's argument is in assuming that the act invalidates mortgages which would otherwise have been valid; it did nothing of the kind; it *validated* (by filing) mortgages which would otherwise have been invalid. The cases cited by the appellee do not support its contention.

In *Stackhouse v. Holden*, 66 App. Div., 433, the transfer related to book accounts, which are choses in action as usually understood by that term. But stocks, bonds and promissory notes have by custom acquired a character something more than choses in action, and are capable of manual delivery. In the case of

*Risley v. Phenix Bank*, 83 N. Y., 318,

the Court (p. 328) made this distinction clear. It said,

“ it is to be observed, that the claim of the  
 “ Bank of Georgetown against the Phenix  
 “ Bank rested in open account on the books  
 “ of the respective banks. *The chose in*  
 “ *action assigned was not a note or bond or*  
 “ *other written obligation, the retention of*  
 “ *which by the alleged assignor would, in*  
 “ *most cases, be strong if not conclusive evi-*  
 “ *dence that the assignment had not been*  
 “ *completed.*”

In the case of the

*National Hudson River Bank v. Chas-*  
*kin*, 28 App. Div., 311,

the Court said, in answer to the claim that there was not an immediate delivery or change of posses-



sion of the property transferred by written instrument:

" We do not think the statutes referred to  
 " are applicable, for the reason that the prop-  
 " erty transferred *was not in the possession*  
 " *of the Sistare firm at the time the transfer*  
 " *was made*, nor was the same goods and  
 " chattels within the meaning of the statute.  
 " \* \* \* The property was transferred to  
 " the Heckshers, could not be delivered. *All*  
 " *of it had been, prior to that time, trans-*  
 " *ferred to third parties as collateral security*  
 " *for the payment of loans made thereon.*"

In a later paragraph on the same page the learned Judge proceeds as follows:

" Now their being no fraud in the trans-  
 " action, and no rights of purchasers or attach-  
 " ing creditors having intervened, the taking  
 " possession of the securities by the Man-  
 " chester house before the bankruptcy was,  
 " in the absence of a statute making it un-  
 " lawful, entirely legal and proper. Regarded  
 " simply as a pledge, the pledgee had the  
 " right to take possession,"

and cites in support of this *Parshall v. Eggert*, 54 N. Y., 18.

In answer to the first paragraph of the last extract of the opinion of Judge Noyes, the equitable lien which he states would arise, would be an attempt to create a lien upon a shifting stock and upon after-acquired property, and this is exactly what the New York Court of Appeals in the *Zartman* case said could not be done for the reasons (p. 272):

" FIRST: Because a man cannot grant what  
 " he does not own, actually or potentially.

" SECOND: Because an agreement permit-  
 " ting the mortgagor to sell for his own ben-  
 " efit renders the mortgage fraudulent as a  
 " matter of law as to the creditors repre-  
 " sented by the trustee in bankruptcy."

*Zartman v. Bank*, 189 N. Y., 272.

The learned Judge was in error in stating that there was no fraud in the transaction here, and that, as no rights of purchasers or attaching creditors intervenes, the taking possession by the Manchester House was entirely legal and proper; such is not the law of New York. *Parshall v. Eggert* was this:

On December 13th, 1866, Roche procured plaintiff to discount his note, maturing January 5th, 1867, and gave plaintiff a paper, in form stating that Roche had received fifty-five tons fine middlings and ten tons bran "as security to my note, given this day for \$1,480." On December 26, 1866, Hunter sold certain mill feed to Roche, but received only part of the purchase price.

Roche disappeared some time between December 26 and January 5. On January 5 plaintiff appeared at Roche's place of business, pointed to "the bran and middlings" and from the clerk in charge demanded possession; the clerk delivered the key, and plaintiff locked up the place, took the keys and departed. Later on the same day, the Sheriff, acting for Hunter, who had started a suit against Roche for the balance of his purchase price, got a locksmith to open Roche's place of business and levied on the stock in the store. Plaintiff brought replevin against the Sheriff, and gave evidence tending to prove "that the bran and middlings in said warehouse January 15, 1867, was the same that was in hand there at the time said receipt was given to the plaintiffs December 13, 1866." A nonsuit was reversed by the Commissioners of Appeals in 54 N. Y., 18, decided in 1873. The Commissioners said (p. 23):

"It may be considered as showing conclusively *against Roche* that the property was delivered by him to the plaintiffs and re-delivered by them to him to be held for them according to the terms of the receipt."

The Commissioners then proceeded to say that anyhow (p. 24):

“ In the absence of any intermediate right  
 “ *the parties* could perfect a written contract  
 “ of pledge by subsequent delivery. \* \* \*  
 “ A creditor who acquires a specific right  
 “ to or lien on the thing pledged may  
 “ prevent the pledgee’s interest in an un-  
 “ delivered chattel from attaching. But such  
 “ is not the condition of the creditor at large.  
 “ The only ground on which he can claim to  
 “ prevent the perfecting of such a right in the  
 “ pledgee is that it works a fraud on him.  
 “ The transaction is not one which any statute  
 “ calls fraudulent in itself, and its validity  
 “ ought, therefore, to go to the jury. Of that  
 “ right at least the plaintiffs were deprived  
 “ by the ruling of the Judge. \* \* \* un-  
 “ less we are prepared to hold that the plain-  
 “ tiffs, *as between themselves and Roche*, were  
 “ not entitled, on either of the grounds above  
 “ discussed, to take possession.”

It is quite apparent that *Parshall v. Eggert* is no authority whatever for the appellee, and that it does not support what the judges below cite it for. In *Parshall v. Eggert*, there was no bankruptcy or insolvency; possession was taken before any creditor touched the mill feed; the New York law does not forbid a preference; the transactions were *inter partes*, and the Court expressly limited its decision to such a state of facts.

In *Skilton v. Coddington*, 185 N. Y., at page 86, the Court expressly said:

“ A creditor by simple contract is within  
 “ the protection of the statute as much as a  
 “ creditor by judgment, but until he has a  
 “ judgment and the lien, or a right to a lien  
 “ upon the specific property, he is not in a  
 “ condition to assert his rights by action as  
 “ a creditor. \* \* \*  
 “ It is true there is to be found in some cases  
 “ a statement that the mortgage is void only  
 “ as to judgment creditors. That statement

“if construed in the light of the circumstances of the case before the Court and with reference to the context of the opinion, is substantially correct, though not strictly accurate as a general proposition.” \* \* \*

“Where the recovery of a judgment becomes impracticable it is not an indispensable requisite to enforcing the rights of the creditor. So it was held that an assignee in bankruptcy, could, for the benefit of creditors, attack a fraudulent mortgage, though if a creditor had sought that relief in his own name it would be necessary that his claim be first put in judgment.”

Judge Noyes, further proceeding in his argument on the question as to the time that the transfer took place, proceeds as follows (p. 1142):

“The possession having been actually taken within four months of the bankruptcy, we now reach the decisive question whether it can be held to relate back to the time when the right to take possession was created, whether the act of taking possession created a lien or merely enlarged and perfected an existing lien. And, in my opinion, in view of the equities between the parties and all the circumstances, such act should relate back to the creation of the right which it perfected, and the *transfer* be regarded as having taken place more than four months before the bankruptcy.”

In support of this proposition the learned Judge cites the case of *Thompson v. Fairbanks*, 196 U. S., 516, which, as pointed out above, does not declare the law of the State of New York. Furthermore, this Court held in the case of *Humphreys v. Tatman*, 198 U. S., 91, that the question whether a transfer did or did not take place at any given date depends entirely upon the local law, and therefore *Thompson v. Fairbanks*, cited by Judge Noyes, is no authority whatever as to whether

a transfer took place in New York State at any given date.

Similarly the case of *Sabin v. Camp*, 98 Fed., 97, is no authority as a declaration of the laws of the State of New York, as it is apparent that that case was decided upon the laws of the State of Vermont. In attempting to distinguish the New York case of *Zartman v. First National Bank* Judge Noyes says:

“ This is not in point because there there  
 “ was merely a contract to give a mortgage  
 “ upon after-acquired property. There was no  
 “ lien which could have been enlarged or per-  
 “ fected by taking possession.”

The characterization of Judge Noyes of the mortgage in that case as merely a contract assimilates that instrument exactly with the instrument in this case because the most that the letters between Manchester and New York can amount to is a *contract*. The New York cases hold that where a mortgage purporting to cover property not owned by the mortgagor is made, the document is in substance and effect merely a *contract to give* a mortgage thereon in future when the property is acquired. This means that the mortgage is a contract, and thus assimilates it exactly to the document in suit; —at least to that construction of the documents most favorable to the appellee.

b. The fraudulent nature of the so-called mortgage, by reason of the permission to the bankrupts to sell all or any part of the securities, keep the proceeds, and substitute (if any substitution at all were made) only what they wished, we consider under Point IV.

#### ANSWERING THE THEORY OF A DECLARATION OF TRUST.

This theory was not seriously advanced by the appellee either before the District Court or before

the Circuit Court of Appeals; but as it is the basis for the minority opinion, that of Judge Ward, in the Circuit Court of Appeals, we consider it. Briefly Judge Ward's reasoning was this:

The transaction was a perfectly honest one, and some construction should be found to favor the Manchester concern if possible; the correspondence used neither the word mortgage nor pledge, nor trust, but the word "escrow," which was used improperly; the use of the word "collateral" in the correspondence and documents does not necessarily indicate a pledge, but only ownership of or interest therein for the purpose of protection; on account of the family connection and the business dealing and the mutual confidence this arrangement was natural. Therefore, the Court said, there was a declaration of trust. The conclusion of the learned Judge does not seem to be warranted by his premises, and as to his premise of honesty, we show in the next Point that the transaction was utterly lacking in good faith toward creditors and prospective creditors, other than the Manchester house. A declaration of trust requires a transfer of title, and certainly there was no transfer of title here, nor was there any accounting by the New York house of the proceeds of the so-called trust *res*. These two facts of themselves we submit make impossible any serious consideration of the trust theory. The majority of the Circuit Court of Appeals took our view and said of the declaration of trust theory (p. 1138):

"I cannot accept this conclusion. It is  
 "an essential element in a declaration of  
 "trust that title pass from a declarant of trust  
 "as an individual to himself as trustee. It  
 "must be shown that he intends to divest  
 "himself of the beneficial interest in the prop-  
 "erty and hold it thereafter as trustee for  
 "the benefit of another. *Now, it is clear*  
 "*from the evidence that this is just what the*  
 "*New York house did not intend to do. They*

“intended to set aside the obligations only as security for their indebtedness to the Manchester house. In case this indebtedness were paid, the latter were to have no interest in the security.”

Whether there was a declaration of trust, and a consequent transfer of the title, is just as much a question of local law as the other questions, namely, those of pledge and equitable mortgage. On this subject the law of New York is as follows:

The leading case is *Martin v. Funk*, 75 N. Y., 137. The law as announced in this case has been modified by the latest decisions of the New York Court of Appeals, especially in the *Matter of Totten*, 179 N. Y., 112.

In *Martin v. Funk*, it was held that where A deposited money in a savings bank to his own credit in trust for B and the account was so entered in the savings bank book delivered to A, this amounted to a declaration of trust in favor of B, although A retained the book in his possession. This case has, however, been explained in later cases.

In *Young v. Young*, 80 N. Y., 422, the Court in distinguishing *Martin v. Funk* said (p. 440) that in that case:

“The donor delivered the money to the bank, taking back its obligation to herself  
“in the character of trustee for the donee,  
“thus parting with all beneficial interest in  
“the fund, and having the legal title vested  
“in her in the character of trustee only.”

In *Barry v. Lambert*, 98 N. Y., 300, the Court said (p. 306):

“It is well settled that a trust in personal  
“property may be created by parol, and that  
“no particular form of words is necessary for  
“its creation, but the words or acts relied on  
“to effect that object should be unequivocal,  
“and plainly imply that the party making  
“them intended to divest himself of his inter-

*"est in the property, and to hold it thereafter  
for the use and benefit of another."*

Citing, *Martin v. Funk*, *Young v. Young*, and other cases.

In *Matter of Bolin*, 136 N. Y., 177, where the bank book was entitled "Julia Cody, or daughter, Bridget Bolin," and the book was left in the custody of the daughter, the Court held there was no valid gift, and said (p. 180):

*"The evidence must show that the donor  
intended to divest herself of the possession  
of her property and it should be inconsistent  
with any other intention or purpose."*

In *Locke vs. Farmers L. & T. Co.*, 140 N. Y., 135, the Court construed an instrument relating to certain shares of stock and sustained it as a valid declaration of trust, although the settlor retained possession of the stock. The Court, after citing *Martin v. Funk*, and reciting the facts, said (p. 141):

*"No beneficial interest in the property was  
left in himself (the settlor), but the whole of  
that interest was by his own act vested  
elsewhere. He held the legal title to the  
stock, but necessarily held it, from the date  
of the declaration, as trustee for the bene-  
ficiaries."*

These cases establish that to constitute a declaration of trust where the property remains in the possession of the declarant or settlor, the latter must intend to divest himself of all beneficial interest in the property and to hold it thereafter as trustee for the benefit of another.

Unless, therefore, Kessler & Co. of New York by their letters, certificates and acts intended to divest themselves of all beneficial interest in the securities and to hold the whole interest therein for the benefit of Kessler & Co. of Manchester, the transaction cannot be sustained as a declaration of trust.

It is plain from the very words of the letters that Kessler & Co. of New York were to hold the securi-



ties only as *security* for their own indebtedness to Kessler & Co. of Manchester on long drawings. If this indebtedness were paid, Kessler & Co. of Manchester were to have no interest in the securities. It is evident that all that was intended was that Kessler & Co. of Manchester were to have a lien on these securities as security for their claim against Kessler & Co. of New York. This may constitute a pledge, but not a declaration of trust. *A man cannot be a technical trustee of his own personal property merely as security for his own debt.* The very fact that the property is to be held by the trustee merely as security for his own debt shows that the trustee has not divested and did not intend to divest himself of all beneficial interest in the property, because upon the payment of the debt the property would revert to him. The beneficial ownership remains in him subject only to the special property or lien created in favor of the creditor. Further, the acts of the parties show no relation of trustee and *cestui que trust*. The securities were sold by the New York house as and when they pleased, without accounting therefor in any way. This they were authorized to do by the agreement and this they did.

If a pledge, imperfect or invalid because of want of delivery of the pledged property, can be sustained as a declaration of trust, the result will practically be to abolish technical pledges "whose very essence" is the possession of the pledged property by the pledgee (*Casey v. Cavaroc*). A cognate question was considered in *Young v. Young*, 80 N. Y., 422, where a gift, invalid because of want of delivery, was sought to be sustained as a declaration of trust. The Court said, page 437:

"It is established as unquestionable law  
 "that a court of equity cannot by its author-  
 "ity render that gift perfect which the  
 "donor has left imperfect, and cannot convert  
 "an imperfect gift into a declaration of trust,  
 "merely on account of that imperfection."

If that could be done, then, the Court said (p. 439): "There never could be a case "where an intended gift, defective for want "of delivery, could not, if expressed in "writing, be sustained as a declaration of "trust."

So in the case of a pledge, imperfect for want of delivery of the pledged property, the Court cannot convert such a pledge into a declaration of trust merely on account of that imperfection. If a writing purporting to create a pledge could be sustained as a declaration of trust, although ineffectual as a pledge for want of delivery of the pledged property, then there never could be a case where an intended pledge, defective for want of delivery, could not, if expressed in writing, be sustained as a declaration of trust.

The essential feature of a pledge is delivery of the pledged property to the pledgee. If an intended pledge, unaccompanied by such delivery, can be sustained as a declaration of trust, then no one would have recourse to a pledge, and all transactions intended to take effect as a pledge would take the form of a declaration of trust with the property remaining in the custody of the declarant of the trust, and formal pledges accompanied by delivery of the property to the pledgee would practically cease to exist.

This would open the door to fraud and deception. The rule requiring possession by the pledgee was adopted to prevent fraud and deception. As was said in *Casey v. Cavaroe* (*supra*):

"The requirement of possession is an inextinguishable rule of law adopted to prevent fraud and deception; for if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

The appellee claims that a trust was declared: What was the trust? Was it to hold the securities,

and deliver them to Manchester? If so, when was the delivery to occur—on demand, or when New York had failed to take care of its drafts?

Was it a trust to sell the securities, and apply so much of the proceeds as might be necessary to cover drafts not taken care of by New York? If so, the sale was surely not to take place until after the drafts had matured and not been taken care of. There is not a line of evidence which tends to show that Manchester conferred upon the New York house the right to sell for *Manchester's* benefit; and the acts of the parties on October 25th and 30th, 1907, absolutely disprove any such intent.

So that the only possible trust was to hold the securities and to deliver possession thereof at some future time—a trust not only indefinite but absolutely unknown to the law of New York. The result of all which was to create a trust in the New York house to deliver the securities at the psychological moment so that Manchester should be a preferred creditor.

#### THE SUBJECT OF EQUITABLE LIENS IN GENERAL.

It is impossible to catalogue, or to delimit in any fixed way, the circumstances, or infinite combinations of circumstances, that may lead equity to grant or refuse relief in any given case; the books are full of cases where courts have said that owing to the very peculiar circumstances of that case relief is refused or granted, and that the case must not be considered a precedent except upon the exact facts. In such a case no human being, however learned in the law, can possibly know what the Court will do until it has done it; *especially as equitable relief is largely a matter of discretion*, and no chancellor's discretion will or can be like any others in every respect. Frequently, too, discretion exercised in one way below, will not be disturbed on appeal even though the higher court would have exercised it differently had they been sitting below.

To call the result of such discretionary relief "equitable liens" is not exact.

Such indefinite and elusive things, are not the "liens" that survive bankruptcy.

The cases where equity has given relief in insolvency cases, are generally where the claimant's money *has produced the very thing sought to be subjected to the lien*, *e. g.*

*National Bank v. Rogers*, 166 N. Y., 380; *Hauselt v. Harrison*, 105 U. S., 401 (both cited below by our adversaries), or where this Court, without considering at all what a State court would have done, sustains a claim for especially peculiar circumstances, *e. g.*

*Hurley v. Alcheson, &c., R. R.*, 213 U. S., 126, in which an additional circumstance (not referred to by the Court) was that equitable and beneficial title to the coal was intended to be passed to the railroad.

Here the appellee has produced nothing; its acceptances in no wise produced the proceeds of the drafts because, obviously, a buyer of unaccepted exchange buys it *from the drawer*, and for his confidence in the drawer, and except for that confidence doesn't know that it will ever be accepted at all.

Our point here is that if equitable principles may be applied it is the duty of *this* Court to define what principles are inherent in each case to overcome the apparent clear intent of the Bankruptcy Act. We insist that the equities here are with us entirely, and that Manchester's acts were not in good faith toward the numerous creditors represented by the trustee. We discuss this in the next point.

### POINT III.

**The transaction between Kessler & Co. of New York and Kessler & Co. of Manchester was inequitable and in bad faith and deceived existing as well as prospective creditors.**

Heretofore we have not considered the good or bad faith of the parties; but only the inexorable rule of law which requires possession in the case of pledge, and, in the case of mortgage or declaration of trust, a transfer of the title and beneficial interest. In other words, we think the law is in favor of the appellant without respect to the appellee's good or bad faith. But if the contrary were the law, we say the same result would follow for the reasons stated at the head of this point.

There must be a reason for an inexorable rule of law. This reason has been pointed out in the leading case on the subject, *Casey v. Cavaroc*, where the Court stated that so long as the pledgor is permitted to *retain possession of his property, creditors have a right to assume that he is the owner of the property which he possesses; and creditors are presumed to deal with him and accord him credit by reason of that fact.* This is for the protection of creditors and the business interests of the country generally "and is a rule of "general policy, which declares possession to be the "evidence of property, and the presumption is that "every man is trusted according to the property in "his possession."

*Martin v. Mathiot, 14 Serg. & R., 214.*  
*Porter Co. v. Boyd, 171 Fed., 305.*

In the *Zartman* case, *supra*, the Court said (p. 271):

"Creditors are presumed to have dealt with  
 "the mortgagor in reliance upon its absolute  
 "ownership of the stock on hand."

Also in *Robinson v. Elliott*, 22 Wall., 525, it was said "men get credit for what they own and possess." The New York house held themselves out to all the world as the owners of the securities, as the arrangement expressly authorized the bankrupts to represent themselves as the owners thereof, while the very securities were subject to a secret lien which was to be later urged to defeat a recovery by said creditor. In their efforts to sell, the New York house had to go among bankers and investors, and these efforts were not confined to the City and State of New York, but extended to England, France, Germany and Switzerland, of which countries certain of the creditors of the New York house are citizens. What would be the natural consequence of such efforts, made by a banking house of the apparent standing of Kessler & Company of New York, among bankers throughout the world, for the sale of these securities? As there were bankers, they held themselves out as acting on their own behalf, which was true. The result was a credit with various bankers and customers, fictitious in fact and fraudulent in law. Judge Ward stated in his opinion (p. 1137) that—

"There was no secrecy as to the securities  
 "under consideration which was not inherent  
 "in their nature. The public does not know  
 "what stocks, bonds or notes a merchant  
 "has and therefore does not give him credit  
 "because of them."

Here Judge Ward failed to discriminate; doubtless a plumber does not get credit for the Chinese tapestries he may own, nor a baker for his collection of Egyptian manuscripts; but the plumber and the baker do get credit for their respective stocks in trade. Now, a plumber's stock in trade is plumbing fixtures, and a baker's cereal food products. By the same token a banker's stock in trade is stocks, bonds and securities, and he doesn't have to put them in a show window to acquaint

people with his substance. Kessler & Company of New York were not merchants; they were bankers whose stock in trade were bonds and stocks, purchased in the expectation of selling them again at a higher price. Ownership of their stocks and bonds was, by their efforts and negotiations for sale and loans, made to appear just as publicly as a merchant's efforts to secure the sale of his flour, oil or wheat is a public ostentation of his ownership.

With the consent of the Manchester house, and frequently at their urging, Kessler & Company of New York went throughout the financial world holding themselves out as the owners of these various securities and seeking credit by reason thereof. Both the opinions rendered in the Circuit Court of Appeals characterized the acts of the two parties as acts in good faith. Good faith to whom? Was it good faith to the creditors? Was it good faith to the correspondents of the house of Kessler, bankers, in England, France, Germany and Switzerland to hold themselves out as owners of the securities, knowing that when they did so there was a secret lien which they intended to enforce in the event that the bankrupts should be unable to meet their engagements? Was it good faith to enter into an arrangement which permitted the New York house to strip itself and yet keep the security of the Manchester house intact, for there was no limit to the securities they could give to the Manchester house. And when at last they became aware that the final reckoning could no longer be postponed, there was nothing to prevent their putting into the escrow all the gilt-edged assets which they had, and removing (or not) from the escrow all securities of doubtful value. In fact, they did just that, for on October 25th, *they took out of the "escrow" Daimler common and substituted Daimler preferred therefor.*

Judge Ward has stated (p. 1137) in his opinion:

"There is no evidence that any exhibition  
 "of or statement as to these securities was  
 "made to any one by the New York house

“for the purpose of obtaining credit. Their books, if examined, would have shown what the real dealing between them and the Manchester house was.”

The case is full of evidence that the bankrupts held themselves out to various people as the owners of these securities, and sought credit thereon, and endeavored with all their power to sell the securities which are contained in these escrows. It appears from the record (p. 689) that credit was sought of Schunck, and that Schunck accepted Orleans County bonds, Muskogee Gas & Electric securities, and that he had been offered Cripple Creek securities and Maclay and Milne, Turnbull Co. notes. It also appears that a drawing credit was asked of the same person upon Daimler preferred stock, which it appears he preferred to the Cripple Creek. The escrows contained the securities named. Special efforts were made by the bankrupts, especially in England and on the continent, to dispose of their holdings in Cripple Creek. On page 735 of the record it is shown that efforts were made to sell the Daimler stock, and that P. W. Kessler was aware of that fact. Efforts to borrow money upon their ownership of the Breweries securities and the Orleans County Quarry Company bonds, from the German Bank, appears on page 736 of the record. It also appears on pages 739 and 743 of the record that a loan was arranged with A. Ruffer (a banker of London) to loan £11,500 with Orleans County Quarry bonds and notes as collateral. It also appears that the Cripple Creek stocks were offered for sale and as security for loans on drawing credits (pp. 743 and 744). It is also shown on the last page, in a letter to P. W. Kessler, why the Cripple Creek Central had not been sold up to that time. It appears again, on page 756 of the record, why the Brewery bonds had not been sold. This explanation was given by the New York house in answer to an



inquiry made by the Manchester house as to why these bonds had not been sold. On page 758 there is further evidence as to efforts to be made to secure credit from the Anglo-Foreign Bank on the Muskogee Gas & Electric securities and the Orleans County Quarry Company securities. On page 760 is shown further efforts to sell the Daimler stock. On page 776 it appears that the Muskogee Gas & Electric Company's bonds were offered to a Glasgow firm for sale. It appears by this letter that the entire remaining bonds belonging to the bankrupts were offered for sale. As above stated, these bonds were in the escrow (see Exhibit 11, between pages 878 and 887 of the Record). On page 779 it appears that the New York house was drawing on the Basler Handels Bank with \$15,000 of Maclay notes and \$15,000 of Orleans County Quarry notes. On page 782 of the record it appears that consent was given by the Merchants' Bank to discount \$45,000 of Orleans County Quarry notes. On page 783 appears a letter written to the Manchester house in which it is stated that the United Breweries bonds are unsalable. This evidently was in response to a further inquiry as to why these securities had not been realized on. On page 786 of the record it appears that the New York house wrote the Manchester house asking them to sell Muskogee Gas & Electric securities, being some of the securities contained in their own escrow. On page 884 of the record again appears the knowledge of the Manchester house and the efforts being made to sell Cripple Creek Central stock and Daimler stock, and the approval of that house to such efforts. Again, inquiry is made by the Manchester house (p. 846 of the record) as to the salability of the Brewery bonds and efforts to obtain a loan with Daimler.

This case is not one of fraud based upon express misrepresentation, and it is not necessary for the trustee in bankruptcy to show that the defendants made express representations false in fact. But the case is full of evidence to show that with the knowl-

edge and consent of the Manchester house the New York house represented itself as the owner of the securities over which the Manchester house claimed a secret lien. It is impossible to say what causes induce the giving of credit. Credit is intangible; it is an atmosphere and arises because of the general reputation and standing of a person in the community. As was said in *Martin vs. Mathiot*, 14 Serg. & R., 214, "It rarely occurs that a man prove what it was that induced him to give credit." As the owner of stocks and bonds he collects coupons and dividends, meets the officers of the various companies which have issued the securities, borrows money from various banks as the owner of the securities, negotiates with various people for the sale thereof; so it becomes a matter of common knowledge throughout the financial world that such a person is the owner of the securities of which he is in possession.

Further, an examination of the pages of the memorandum book on which were entered the sales and hypothecation of the securities (pp. 879-885) will show how frequent and numerous these transactions were. The letters passing between the parties show every change of the securities and what was said thereupon by Manchester (pp. 889-939).

Every time the New York house negotiated for a sale of these securities or any part thereof they represented themselves as the owners of the property.

While, therefore, the New York house was representing itself as the owners of the securities now claimed by Manchester by virtue of the secret lien the Manchester house knew the failing financial condition of the New York house; they knew that the capital of the New York house was locked up in securities which could not be sold except at a loss, and that the securities were not listed on the New York Stock Exchange; they knew that a financial storm was passing over the country with New York as its centre; they knew that the panic of 1893 and 1903 were nothing compared to that

then raging; they knew that the managing partner in New York was so disturbed that he took "drops" to induce sleep; they knew that the other partner was abroad seeking renewals and extensions of credit which he could not get; they knew that the values of securities were depreciating daily on the Stock Exchange and that there was no market for unlisted securities and that the foreign and domestic bankers were withdrawing credits and calling loans; they knew that a verdict for a large amount, \$140,000, had been taken against the New York house which was affecting their credit; they knew that when loans were called the New York house begged for time in order to get money elsewhere; they knew that the general business of the New York house was bad and that many of its customers had ceased buying exchange; they knew that the Cripple Creek Central Railway had a deposit of over \$100,000. with the New York house and that (Blackmer) the President of the Railroad, was dealing with the New York house as the owner of securities some of which were pledged secretly to them (Manchester).

What would have been the effect upon such depositor or any other depositor or creditor in those days when banks and trust companies were failing or with difficulty sustaining runs, if they had been told that \$600,000 of securities apparently owned by the New York house were not their property, but were the property of the Manchester house.

Yet the depositors and creditors generally were giving credit to the New York house day to day upon the strength of their ownership of these securities; they knew that during all the time the New York house was selling long drafts (borrowing money) and was asking credit right and left as the owner of the property covered by the escrow:

Knowing all this, they stood by and let creditors deal with the bankrupts as the owners of the securities until failure came.

Then they announce to the world that a large

part of the capital of the bankrupts was theirs by virtue of a secret lien, and seek to enforce the same. We say that they are ESTOPPED.

We believe that the real facts show anything but good faith on the part of the Manchester house, and that the agreement and acts under it were unconscientious and in bad faith.

#### POINT IV.

**The agreement between the parties was fraudulent as a matter of law irrespective of good or bad faith, and was void as against creditors.**

This is so, whether the agreement be considered as one for a pledge, or for a mortgage, or as a declaration of trust, or in any other aspect. It was absolutely void, because both in terms and by the construction of the parties it allowed the bankrupts to sell the securities supposedly affected by the equitable lien, free and clear from the lien, without accounting for the proceeds, without applying them in satisfaction of the debt, and without substituting therefor any other securities except such as the bankrupts' discretion might dictate, without even supervision as to character, amount or value.

Very likely one or two expressions may be found in Manchester's letters intimating that the substituted securities ought to be of the same or greater value, but Manchester did not have nor claim the right, nor did it in any instance exercise the right to consider the substituted securities or veto them; in several instances a mild sarcasm was indulged in over the quality of the substituted securities, but this was all (p. 904, fol. 2691; p. 906, fol. 2695; p. 920, fol. 2737; p. 926, fol. 2755; p. 932, fol. 2875;

p. 935, fol. 2784). *But the convincing fact about this matter of substitution is that time after time the bankrupts withdrew securities and did not substitute anything for them at all; and this was just what they did in every case where they could spell out any increase in the market value of the securities already in the escrow.*

Thus the bankrupts on August 26th, 1904, took out \$25,073.81 of securities from the escrow and replaced only \$13,980 worth because certain other securities, viz.: Chicago & Great Western had, as stated, increased in value by about \$13,000; this was approved by Manchester (fols. 2673-2676); again, on March 6th, 1905, over \$25,000 was removed and only \$12,500 of new securities added, the difference being made up by the alleged increase in the value of certain Reductions stock already in the escrow; this was approved by Manchester (fols. 2708-2711); again, on April 13th, 1905, \$39,700 of securities were removed and nothing was replaced owing to the alleged enhanced value of U. S. Reduction and Refining stocks, which Manchester approved (fols. 2713-2715); again, on May 15th, 1905, \$31,400 of securities were withdrawn and only \$18,000 replaced because "in spite of these prices you have \$537,000 collateral whereas our drawings are only \$480,000" (fols. 2717-2718).

The exhibits 6, 7, 8, 9, 10, 11 and 12 (pp. 878-885) are transcripts from the page of the loan book referring to the escrow. The testimony was that each time Manchester securities were removed, the securities so removed were scratched out with a pen and the substituted security (when one was substituted) was interlined. The merest examination of these exhibits and of the letters (pp. 892-938), which refer to the withdrawals, will show that withdrawals were being made almost constantly, and that Manchester expected the bankrupts to have constant occasion to "vary the deposit" (fol. 2653). All this means that the Manchester house was not in reality relying on the

escrow itself but on the confidential relations existing between the houses, multiplied by their close family ties and the common ownership of stock in both companies by Alfred Kessler, the bankrupts' head firm member.

The New York authorities are numerous and decisive that clauses permitting the debtor to use the securities as his own make the agreement fraudulent in law and void *ab initio* as to creditors; and that if the debtor and creditor act in such a way that the debtor uses the property as his own, the result is the same:

*Zartman v. 1st Natl. Bank, 189 N. Y., 267, 273, supra, and cases cited below.*

In the Zartman case there was a duly recorded mortgage of real and personal property; a clause therein purported to cover after acquired personal property. Personal property consisting of shifting stock and material on hand was after acquired, and the mortgagee took possession of it three days before bankruptcy proceedings against the mortgagor. The mortgage provided that "until default shall be made in the payment of the interest or principal of the said bonds or some of them \* \* \* it shall be lawful for the said party of the first part \* \* \* to have, hold, use, possess and enjoy the said premises and property with the appurtenances, and to receive the income and profits thereof to its own use and benefit without hindrance or interruption." The mortgagee contended that while the mortgage did not create an absolute lien upon the after acquired stock and materials, it did operate as an executory contract to deliver possession and to place the property, as rapidly as it was acquired, under the lien of the mortgage, and that, although such property was subject to seizure by creditors up to the time when the mortgagee took possession pursuant to the mortgage, yet the act of taking possession ripened the lien and made it absolute as

against general creditors or those with no prior lien. The highest court of New York held that the clause gave the mortgagor power to sell for its own benefit all materials and products until the trustee took possession; and that such clause rendered the instrument, in so far as it applied to such property, fraudulent as a matter of law as to the creditors represented by the trustee (citing at page 273, many of the cases noted below).

*Skilton v. Coddington*, 185 N. Y., 80, was an equity action to enforce an alleged chattel mortgage made on October 4th, 1897, by W. J. B. to plaintiff covering stock and fixtures in W. J. B.'s store and stock thereafter to be upon the said premises. (Under the New York law this chattel mortgage, in so far as it purports to cover after-acquired property, was merely an agreement to mortgage such articles when they come upon said premises.) The instrument provided that W. J. B.

"may sell and dispose of said property and  
 "apply the proceeds of such sale to the pay-  
 "ment of the debt" and W. J. B. cove-  
 nanted "that as said stock is sold \* \* \*  
 "he \* \* \* will apply the proceeds to the  
 "payment of such debt, excepting such por-  
 "tion thereof as is necessary for the expenses  
 "of the business or as he or they may need it  
 "to replenish or increase the said stock of  
 "goods, wares and merchandise, it being  
 "understood and agreed that in such case the  
 "substituted stock shall take the place and  
 "be in stead of the stock so sold, and it being  
 "also understood and agreed that no part of  
 "said stock or of the proceeds shall be used  
 "or disposed of \* \* \* except as herein-  
 "before set forth." W. J. B. further cove-  
 nanted that he would keep the said stock  
 "replenished, renewed and of a value at  
 "least equal to its then value." This chattel  
 mortgage was made October 4th, 1897, was  
 not filed until October 2, 1902, and on No-  
 vember 7, 1902, plaintiff demanded posses-  
 sion which was refused. On November  
 25th, 1902, W. J. B. became bankrupt.

The bankruptcy court directed the trustee to reserve certain proceeds to meet any liens or claims that might be on the property, and thereupon plaintiff brought this action and prevailed until he got to the Court of Appeals where the agreement, or chattel mortgage, was held void.

*On the fraudulent nature of the instrument*, the Court of Appeals said this: *notwithstanding the express finding of fact of the Courts below that the mortgage was made in good faith*, it was fraudulent as a matter of law and void as against all creditors. The Court disapproved the provision permitting the mortgagor to sell the stock even though the proceeds should be invested in new stock which should pass under the mortgage. The Court said (p. 91):

"The substituted property might or might not equal in value the property realized from the lien of the mortgage by sale. Even in the most favorable view it would give the mortgagor unlimited power of speculation in the disposition of the mortgaged property. The property might be wasted by ill-judged speculation, even though the mortgagor acted in good faith,"

but, said the Court, the agreement was fraudulent and void because (p. 91),

"it does not require all the proceeds of the mortgaged chattels to be applied either on the mortgage debt or to the acquisition of new property, but only the surplus after deducting the expenses of carrying on the business \* \* \* (Of such a provision \* \* \* it is idle to argue that if the mortgagor acted honestly and lived up to his agreement the property newly acquired would be the equivalent of that disposed of by sale. On the contrary, it is not only possible, but, if the business proved unsuccessful, probable that a large part of the mortgaged property would be sold without the proceeds being applied either to the reduction of the debt or to new property substituted for that disposed of. The purpose



“and intent of the agreement between the  
 “parties is plain on its face. The mortgagor  
 “was to conduct the business for the term of  
 “five years in the same manner as if he was  
 “the absolute owner of the stock in trade,  
 “selling and buying stock at his pleasure and  
 “discretion and paying the expenses of the  
 “business out of the sales, while if at any  
 “time he should be unsuccessful and be  
 “pressed by his creditors, the whole stock  
 “was to be subject to the lien of the mort-  
 “gage as against the creditors from whom  
 “the very goods might have been purchased.  
 “No case in this State has gone to the extent  
 “of upholding such an agreement, and in our  
 “opinion it is fraudulent and void as a matter  
 “of law.”

In *Bowdish v. Page*, 153 N. Y., 104, a paper or contract was made by which a lien was sought to be created on certain chattels. The mortgagee took possession of the goods on July 23rd, and thereafter, on a judgment obtained on April 30th by a creditor against the mortgagor on which execution was issued on July 29th, the Sheriff levied on the goods on August 1st; thereupon the mortgagee sued the Sheriff and the creditor. The Referee held, on sufficient evidence, that the mortgage had become void, not because of any provision of the Statute, but because of the conduct of the mortgagor and mortgagee in respect to the property. The Court of Appeals held, that as possession was not given pursuant to the mortgage, which was void, but upon an independent transfer, the plaintiff could recover, because while this independent transfer created a preference, preferences are not against the law of New York. Needless to say, the opposite result would have been reached in the *Bowdish* case, if the plaintiff there had not obtained the possession on July 23rd.

In *Scherl v. Flam*, 129 App. Div., 561, the plaintiff, a wholesale flour merchant, made an agreement with Z, a baker, by which Z agreed to buy all his flour from the plaintiff, and plaintiff agreed to sup-

ply it as needed; but that the title thereto should remain in the plaintiff until paid, and that as Z should "desire" it, he should notify the plaintiff, "and shall then immediately, at his earliest convenience, pay the plaintiff for such flour by him intended to be used, and upon such payment the title" should pass to Z. This contract was filed, and hence its invalidity was not by command of the statute; moreover, the New York Lien Law (Section 112) made such sales, unless filed, void only as against subsequent purchasers, pledgees or mortgagees in good faith. Some of Z's judgment creditors levied on flour delivered by the plaintiff to Z, and plaintiff seeks to recover it. The Court held the agreement to be void and fraudulent on its face, and the defendant prevailed.

In *Hangen & Hangen v. Hachemeister*, 114 N. Y., 566, a chattel mortgage covering the fixtures and supplies of a saloon was held fraudulent and void because it was made pursuant to an agreement that the mortgagor should continue in the possession of the property and of the full and free enjoyment of it with the right to sell and dispose of the liquors, cigars, etc., without applying the proceeds upon the mortgage debt.

In *Southard v. Benner*, 72 N. Y., 424, it was held that if at the time a chattel mortgage covering merchandise stock is executed it is understood and agreed that the mortgagor may sell the stock and use the proceeds in his business, and the agreement is carried out, the transaction is fraudulent in law as against the creditors of the mortgagor; and that such an agreement may be proved by parol and may be inferred from the fact that the mortgagee had permitted the sales to be made.

In *Potts v. Hart*, 99 N. Y., 168, such a mortgage was held void, although there was only a tacit understanding that such sales might be made.

In *Russell v. Winne*, 37 N. Y., 591, such a mortgage was held fraudulent and void whether the agreement was contained in the mortgage itself or was independent of it.

In *Mandeville v. Avery*, 124 N. Y., 376, a chattel mortgage was held fraudulent and void which was executed under an agreement that the mortgagor might remain in possession and sell the property and use the avails in substantially the same manner as before the execution of the mortgage.

The authorities in support of the proposition might be multiplied indefinitely; other cases are:

*Wood v. Lowry*, 17 Wend., 492.

*Chatham Bank v. O'Brien*, 6 Hun, 231.

*Griswold v. Sheldon*, 4 N. Y., 584.

*Gardner v. McEwen*, 19 N. Y., 123.

*Brackett v. Harvey*, 91 N. Y., 214.

*Bainbridge v. Richmond*, 47 Hun, 391.

And when an agreement for security or protection is thus fraudulent in law and void, it may be attacked by any creditor, whether having a judgment or not, if it is impracticable or useless to obtain a judgment.

*Skilton v. Coddington*, 185 N. Y., 80, 86-89.

*Russell v. St. Mart*, 180 N. Y., 355, 359-360.

*Karst v. Gane*, 136 N. Y., 316, 323.

*Stephens v. Perrine*, 143 N. Y., 476.

In some of the cases cited the invalidity of the instrument resulted from the statute requiring registration; in other cases from the manner of dealing with the property; in some cases from both causes. But the Court of Appeals made no distinction depending on the cause of such invalidity, and, moreover, expressly said that there could be no difference in the result whether the vice resulted from fraudulent clauses and fraudulent dealing with the property or from lack of registration.

*Bowdish v. Page*, 153 N. Y., 104, 109.

The law of New York on this subject, as above stated, is precisely the law of this Court:

*Knapp v. Milwaukee Trust Company*, 216 U. S., 545.

In the Knapp case the holder of an alleged chattel mortgage covering telephone apparatus inter-

vened in the bankruptcy proceedings. The mortgage permitted the mortgagor "to remain in possession of the property, applying the proceeds thereof to his own use, except that no dividend shall be declared or paid without first making provision for the sinking fund and interest on the bond, and permitting the mortgage trustee to waive payment into the sinking fund for any quarter year, in which case the moneys which would otherwise go into the sinking fund for the purchase of bonds, shall remain at the disposition of the mortgagor, to be distributed as dividends, or to be used for the benefit of the business and property in the manner described." *There was no finding of intentional bad faith*; but under the laws of Wisconsin, as construed by her highest court, such conditions rendered the instrument fraudulent in law and void as to creditors, and this Court reversed a decree in favor of the intervenor and overruled his claim that the trustee might not, himself, assail the mortgages. The Court said that the fact that in *Security Warehousing Co. v. Hand* the attempted pledge was characterized as "mere pretense, a sham," did not distinguish that case, and that a conveyance fraudulent in law and void as to creditors may be attacked by the trustee in bankruptcy.

### POINT V.

**The decree of the Circuit Court of Appeals should be reversed and the decree of the District Court affirmed and reinstated, with costs in all courts.**

December, 1911.

JOHN LARKIN,  
Of Counsel for Appellant.

[RECEIVED]

*John Larkin*  
*Alex. S. Andrews,*